(2)

Supreme Court, U.S.
FILED

No. 03 1434 APR 13 2004

In The Supreme Court of the United States

NIELS LAUERSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2002

Petition for Rehearing Decided: March 24, 2004
argued: January 9, 2004

Docket Nos. 01-1526(L), 01-1600 (XAP)

UNITED STATES OF AMERICA
Appellee-Cross-Appellant,

v.

NIELS LAUERSEN,
Defendant-Appellant-
Cross-Appellee.

Petition for rehearing Decided:
argued: January 9, 2004;
finally submitted: January 30, 2004

Docket No. 02-1338

UNITED STATES OF AMERICA,
Appellee,

v.

JAMES RINALDO JACKSON,
Defendant-Appellant.

[ENTERED: MARCH 24, 2004]

Before: NEWMAN, WINTER, AND B.D. PARKER, Circuit Judges.

On petition by the United States of America for rehearing.

Rehearing granted; previous decisions adhered to.

Nathaniel Z. Marmur, New York, N.Y. (David I. Schoen, Stillman & Friedman, P.C., New York, N.Y., on the brief), for Defendant - Appellant - Cross - Appellee Lauersen.

Vida M. Alvy, Great Neck, N.Y. (Gail Jacobs, Great Neck, N.Y., on the brief), for Defendant-Appellant Jackson.

James G. Cavoli, Asst. U.S. Atty., New York, N.Y. (James B. Comey, U.S. Atty., Gary Stein, Lisa Horwitz, Adam Siegel, Asst. U.S. Attys., New York, N.Y., on the brief), for Appellee.

JON O. NEWMAN, Circuit Judge.

The United States has petitioned for rehearing in each of the captioned cases to challenge our rulings that permit the sentencing judges on remand to consider a downward departure. We permitted the departure because the combined effect of substantially overlapping offense level adjustments and the increased extent of enhancement of the applicable

sentencing range that occurs at the higher end of the sentencing table resulted in the overlapping adjustments adding significantly more time to the sentence ranges than would have occurred if the adjustments had been applied at the lower end of the sentencing table.[1] See United States v. Lauersen, 348 F.3d 329, 342-44 (2d Cir. 2003); United States v. Jackson, 346 F.3d 2, 262 (2d Cir. 2003)[2] Because we had ruled on our own motion that such "cumulative effects" departures were available and the parties had not briefed the issue on the original appeals, we granted the Government's petitions for rehearing, afforded time for briefs, and heard oral argument. We now adhere to our original rulings for the reasons set forth in this opinion.

Background

The facts are detailed in our prior opinions. We recapitulate only the essential facts that bear on the departure issue.

Lauersen. Niels Lauersen, an obstetrician/gynecologist, was convicted of health care fraud. He

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[1] The sentencing table is constructed with the low adjusted offense levels and the corresponding low sentencing ranges in the top rows of the table and the high adjusted offense levels and the corresponding high sentencing ranges in the bottom rows of the table. By using the terms "higher end" and "lower end" of the sentencing table, we mean the portions of the sentencing table at which sentencing ranges are high and low, respectively.

[2] Although Lauersen is reported in the Federal Reporter after Jackson, it was decided two weeks earlier. The later placement results from the fact that the original opinion, filed on Sept. 15, 2003, was amended on Nov. 25, 2003, after the Jackson opinion was filed on Oct. 1, 2003, and amended on Oct. 22, 2003.

submitted false claims to insurance companies by misrepresenting fertility treatments, which were not covered by his patients' insurance, as other procedures that were covered.

The District Court calculated his adjusted offense level under the Sentencing Guidelines to be 29. Starting from a base offense level of 6, see U.S.S.G. § 2F1.1(a) (2000),[3] the Court added 13 levels for the amount of the loss, see id. § 2F1.1(b) (1) (N); 2 levels for more than minimal planning, see id. § 2F1.1 (b) (2) (A); 4 levels for leadership role, id. § 3B1.1(a); 2 levels for abuse of trust, see id. § 3B1.3; and 2 levels for obstruction of justice, id. § 3C1.1. The adjusted offense level of 29 in Criminal History Category I yielded a sentencing range of 87 to 108 months. See id. ch. 5, pt. A (Sentencing Table). The Court imposed a sentence of 87 months (seven years and three months), the minimum of the applicable sentencing range.

On the original appeal, we upheld the Government's contention, raised on its cross-appeal, that the District Court had erred in not increasing the adjusted offense level by an additional 4 levels pursuant to U.S.S.G. § 2F1.1(b) (8) (B). Lauersen, 348 F.3d at 343. That enhancement applies if the offense "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense."[4] U.S.S.G. § 2F1.1(b) (8) (B). The revised

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[3] All references are to the 2000 version of the Guidelines, which applies to both of the pending cases.

[4] The financial institution adjustment, after an amendment in 2001, see U.S.S.G. App. C, vol. II, amend. 617, provides an

adjusted offense level of 33, which we required to be used on remand, yielded a sentencing range of 135 to 168 months. See id. ch. 5, pt. A (Sentencing Table). The additional adjustment increased the minimum of Lauersen's sentencing range by 48 months (four years).

Before remanding, we ruled that the additional enhancement "creates a new circumstance that might well justify a downward departure." Lauersen, 348 F.3d at 343. As we explained, the new enhancement substantially overlapped with the existing 13-level enhancement for the amount of the loss because "the large amount of money involved in the fraud significantly triggers both of them." Id. at 344. We also noted that in Lauersen's case, the added adjustment increased the minimum of his sentencing range by four years, a much larger amount than would have resulted if his adjusted offense level had not placed him at such a high level in the sentencing table. Although recognizing that the two enhancements did not constitute impermissible double-counting, we concluded "that the cumulation of such substantially overlapping enhancements, when imposed upon a defendant whose adjusted offense level translates to a high sentencing range, presents a circumstance that is present 'to a degree' not adequately considered by the Commission." Id. (quoting 18 U.S.C. § 3553 (b) (1)). For that reason we permitted the District Court to

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increase of only 2 levels, see id. § 2B1.1(b) (12) (A) (2001). Lauersen cannot benefit from this reduction because the amended Guidelines, if applied to all aspects of his guideline calculation, would increase his adjusted offense level from 33 to 36, and the "one-book" rule precludes application of only one beneficial change from a subsequent version of the Guidelines. See United States v. Keller, 58 F.3d 884, 889 (2d Cir. 1995).

"exercise discretion to mitigate the effect of the enhancement by making a downward departure." Id. (footnote omitted).

Jackson. James Jackson was convicted of fraud offenses involving identity theft employed to purchase valuable items and charge them to his victims' credit card accounts.

The District Court calculated his adjusted offense level under the Sentencing Guidelines to be 21. Starting from a base offense level of 6, see U.S.S.G. § 2F1.1(a), the Court added 10 levels for the amount of the loss, see id. § 2F1.1 (b) (1) (K); 2 levels for more than minimal planning, see id. § 2F1.1 (b) (2) (A); 2 levels for use of sophisticated means, see id. § 2F1.1 (b) (5) (C); and 4 levels for leadership of an extensive criminal activity, see id. § 3B1.1 (a). With a 3-level reduction for acceptance of responsibility, see id. § 3B1.1 (a), (b), the resulting adjusted offense level of 21 in Criminal History Category VI yielded a sentencing range of 77 to 96 months. See id. ch. 5, pt. A (Sentencing Table). The Court imposed a sentence of 96 months, the maximum of the applicable sentencing range.

On the original appeal, we affirmed, ruling that the challenged adjustments, although overlapping, did not constitute impermissible double-counting. Jackson, 346 F.3d at 25-26. Nevertheless, we concluded that, as in Lauersen, the cumulative effects of the overlapping enhancements for the amount of the loss, more than minimal planning, sophisticated means, and leadership of an extensive criminal activity, combined with the significant impact of these enhancements at the higher

end of the sentencing table permitted consideration of a departure by the District Court on remand. See id. at 26. As we pointed out, "Most fraud schemes that obtain more than one half million dollars involve careful planning, some sophisticated techniques, and are extensive." Id.

Discussion

The Government's petitions for rehearing challenge the propriety of the "cumulative effects" departure that we authorized the sentencing judges to consider in Lauersen and Jackson. The core of the Government's argument is that each of the two factors that contributed to our allowance of such a departure- - (1) the aggregation of overlapping enhancements and (2) the increased sentencing effect of an enhancement upon a defendant at the higher end of the sentencing table compared to the effect at a lower level - - were expressly prescribed by the Sentencing Commission. Therefore, the Government's argument continues, they cannot constitute a circumstance present (in a particular case) to a degree not adequately considered by the Commission, such as would permit consideration of a departure under 18 U.S.C. § 3553 (b) and U.S.S.G. § 5K2.0. We agree with the Government's premises, but not its conclusion.

There is no doubt, as the Government contends, that the Commission prescribed that all applicable offense-level enhancements are to be aggregated. The Commission specified in an introductory section of the Guidelines that offense level adjustments are "cumulative (added together)," whether adjustments

are "from more than one specific offense characteristic within an offense guideline" or "from different guideline sections."[5] U.S.S.G. § 1B1.1, comment. (n.4). We have regularly recognized that all applicable offense-level adjustments are to be aggregated, at least in the absence of impermissible double-counting. See, e.g., United States v. Martin, 78 F.3d 808, 813 (2d Cir. 1996); United States v. Howard, 998 F.2d 42, 48 (2d Cir. 1993). Indeed, that principle underlay our agreement with the Government's claim on its cross-appeal for an additional enhancement in Lauersen and our rejection of the Defendant's challenges to his enhancements on appeal in Jackson.

There is also no doubt, as the Government further contends, that the Commission deliberately constructed the sentencing table so that each enhancement results in an increase in the sentencing range that becomes larger as the adjusted offense level increases. For example, in Criminal History Category I, a 4-level enhancement added at offense level 17 increases the sentencing range minimum by 13 months; at offense level 27, by 38 months; and at offense level 37, by 114 months.[6] Instead of causing the sentencing

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[5] The introductory section provides an exception to cumulation where "the guidelines specifies that only the greater (or greatest) [of the adjustments] is to be used." U.S.S.G. § 1B1.1, comment. (n.4)..

[6] The Commission's policy decision to impose more punishment for the same enhancement upon defendants with higher adjusted offense levels than upon those with lower adjusted offense levels would seem to have stronger justification for some enhancements than for others. For example, the 4 level enhancement for being the leader of a criminal activity with five

range minimum to increase by the same number of months whenever an enhancement increases the adjusted offense levels, the sentencing table causes the sentencing range minimum to increase by approximately the same percentage. With each 4-level enhancement, the increase is approximately 50 percent. For example, a 4-level enhancement added at adjusted offense level 17 increases the sentencing range minimum by 54 percent; at level 23, by 52 percent; and at level 29, by 55 percent.[7] Because the sentencing table is structured to have this percentage proportionality effect, the Government argues, the fact that Lauersen's 4-level enhancement and Jackson's various enhancements increase their sentencing range minimums by much more than would have occurred if their unadjusted offense levels were lower could not be

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or more participants, see, U.S.S.G. § 3B1.1 (a), should result in a larger increment of punishment for a defendant who is the leader of an organization selling large quantities of narcotics than for a defendant who is the leader of an organization selling small quantities of narcotics. On the other hand, if two narcotics sellers recklessly endangered another person while fleeing from the police, it not so clear that the 2-level enhancement for creating such danger, see U.S.S.G. § 3C1.2, should result in a larger increment of punishment for the seller of large quantities of narcotics than for the seller of small quantities of narcotics, after their respective narcotics quantities had already differentiated their adjusted offense levels.

[7] In general, "[a] change of six levels roughly doubles the sentence irrespective of the level at which one starts." U.S.S.G. ch.1, pt. A, ¶ 4 (h). As the Government points out, "the only way to achieve 'percentage proportionality' - -as was the aim of the Commission - - is to increase sentencing ranges by a disproportionately greater number of months as offense levels rise." Br. for Appellee at 16 n.*.

a circumstance not adequately considered by the Commission.

Although the Guidelines contemplate the aggregation of applicable enhancements and provide increasing sentencing range increments as the adjusted offense level increases, we continue to believe that when the addition of substantially overlapping enhancements results in a significant increase in the sentencing range minimum (as it does at the higher end of the sentencing table), a departure may be considered. What is present to a degree not adequately considered by the Commission is the combined effect of the aggregation of substantially overlapping enhancements and the large increase in the sentencing range minimum at the higher end of the sentencing table. We do not doubt that in Lauersen's case, for example, the Commission expected the 4-level financial institution enhancement to be added to other applicable enhancements. Nor do we doubt that the Commission expected, in the general run of cases, that an additional 4-level enhancement would increase the sentencing range minimum by many more months for a defendant with a high unadjusted offense level than for a defendant with a low unadjusted offense level.

Nevertheless, the Commission is unlikely to have considered the combined effect upon sentencing range minimums of every group of enhancements that could be imposed under the Guidelines. The Guidelines provide for scores of possible enhancements. Even if there were only 50 possible enhancements, there would be 1, 225 possible pairings

of any two such enhancements.[8] Where, as in the pending cases, applicable enhancements substantially overlap, we see no indication that the Commission adequately considered how serious an effect on the sentencing range minimum would result for a defendant whose unadjusted offense level is at the higher end of the sentencing table. For Lauersen, the addition of the financial institution enhancement (on top of his enhancement for the amount of loss) increases his sentencing range minimum by four years - - from seven years and three months to eleven years and three months.[9] For Jackson, the addition of his

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8 The formula for the number of combinations of p selections from a group of n items is n1/(n-p)! x p!.

9 At oral argument on rehearing, the Government disputed that the enhancement increased Lauersen's sentencing range minimum by four years. The argument is based on the Commission's recommended sequencing of adjustments in arriving at an adjusted offense level. The Guidelines instruct that specific offense characteristics, such as the financial institution adjustment, are to be applied, in the order listed, immediately after the base offense level has been determined, see U.S.S.G. § 1B1.1 (b), i.e., prior to other adjustments. Thus, the Government argues, the financial institution adjustment should have been added after the sentencing judge determined the base offense level of 6 and added 13 levels for the amount of loss and 2 levels for more than minimal planning. Therefore, the argument continues, the addition, at that point in the calculation, of 4 levels for the financial institution enhancement would have increased the adjusted offense level from 21 to 25, which would have increased Lauersen's sentencing range minimum by 20 months, from 37 to 57.

The argument is arithmetically correct in reflecting the proper ocquence of determining the final adjusted offense level, but incorrect in its ultimate conclusion. The incontrovertible facts are that without the financial institution enhancement, Lauersen's

three overlapping enhancements (on top of his enhancement for the amount of loss) increases his sentencing range minimum by three years and eight months, from two years and nice months to six years and five months.[10]

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sentence would have been (in fact, was) seven years and three months; and the difference is four years. Perhaps what the Government means is that the financial institution enhancement accomplishes a four-year increase only because it is imposed in combination with other enhancements.

[10] It is instructive to compare what the effect of each of Jackson's three overlapping enhancements would have been if each one had been added without the other two. With a base offense level of 6, a 10-level adjustment for amount of loss, and a 3-level decrease for acceptance of responsibility, Jackson's adjusted base offense level was 13 before any of the three overlapping adjustments was added. Each of his 2-level adjustments alone would have increased his adjusted offense level to 15, causing his sentencing range minimum to increase by 8 months - - from 33 months to 41 months (in Criminal History Category VI). His 4-level adjustment alone would have increased his adjusted offense level to 17, causing his sentencing range minimum to increase by 18-months- -from 33 months to 51 months.

However, with either one of the two 2-level adjustments and the 4-level adjustment already increasing the adjusted offense level from 13 to 19, the addition of the second 2-level adjustment increased the adjusted offense level to 21, causing his sentencing range minimum to increase by 14 months - - from 63 months to 77 months. Thus, the last 2-level adjustment, imposed with the other overlapping adjustments, nearly doubled the increase in his sentencing range minimum compared to its effect if added alone (14 months versus 8 months).

The cumulative effect of the 4-level enhancement can be similarly analyzed. With each of the two 2-level adjustments already increasing the adjusted offense level from 13 to 17, the

The Commission itself has recognized that uniform application of the percentage proportionality structure of the sentencing table is not always warranted. In explaining the percentage proportionality aspect of the sentencing table, the Commission noted that it had "discovered that proportional (percentage) adjustments to sentence length are frequently appropriate." United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 15 (1987). The plain implication is that the percentage increase in sentences normally resulting when enhancements are added to an offense level are sometimes not appropriate. An aggregation of substantially overlapping enhancements at the higher end of the sentencing table would seem to be the sort of circumstance that prompted the Commission to deem the percentage proportionality of the sentencing table to be appropriate "frequently" but not always.

The Government argues that the Commission must have intended all combinations of enhancements, whether or not substantially overlapping, to have whatever effect results from the structure of the sentencing table because the Commission expressly set a limit on the increase in adjusted offense level that can

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addition of the 4-level adjustment increased the adjusted offense level to 21, causing his sentencing range minimum to increase by 26 months- -from 51 months to 77 months. Thus, the 4-level adjustment, imposed with the other overlapping adjustments, increased his sentencing range minimum 44 percent more than would have occurred if this adjustment had been added alone (26 months versus 18 months).

result from a few specific pairings of enhancements.[11] However, the fact that the Commission chose to put a ceiling on the combined effect of a small number of pairings of enhancements does not mean that it adequately considered all of the vast number of combinations of enhancements that are possible under the Guidelines and intended to preclude a sentencing judge from considering a departure where a combination of substantially overlapping enhancements has a significant effect on sentencing ranges at the higher end of the sentencing table.

The Government also argues that a "cumulative effects" departure, available for adjusted offense levels at the higher end of the sentencing table, perversely "rewards a defendant for particularly egregious wrongdoing . . . ." Br. for Appellee at 20. This is an odd use of the concept of a "reward." Defendants like Lauersen and Jackson are being given added punishment because of the imposition of overlapping enhancements, and the amount of the added punishment is much longer in months than would have occurred if their adjusted offense levels had been lower. The "cumulative effects" departure simply permits a sentencing judge to mitigate the extent of that added punishment, leaving them still subject to more punishment than they would have received if their enhancements had been applied to a lower

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11 For example, for the offense conduct of aggravated assault, the maximum enhancement for use of a firearm is 5 levels, U.S.S.G. § 2A2.2 (b) (2) (A), and the maximum enhancement for injury to a victim is 6 levels, id. § 2A2.2 (b) (3) (C), but cumulative adjustments under both provisions are capped at 9, id. Similar capping is prescribed for a combination of weapon and injury enhancements with respect to robbery, id. § 2B3.1 (b) (3), and extortion, id. § 2B3.2 (b) (4).

unadjusted offense level. Even if they receive a departure in the sentencing judge's discretion, it is unlikely that they will consider a slight reduction in an additional punishment to be a "reward."

Finally, the Government contends that a "cumulative effects" departure for overlapping enhancements at the higher end of the sentencing table "threatens to erode the entire Guideline system and that system's core goal: national uniformity among similarly situated defendants." Br. for Appellee at 24. We think this contention substantially overstates the impact of this departure. Preliminarily, we note our doubt that national uniformity is being achieved under the Sentencing Guidelines. Although each guideline is applied to all defendants within its coverage, mechanisms such as departures authorized by the Guidelines and various other circumstances are markedly reducing whatever uniformity of results might have been expected.

For example, as the Commission itself has reported based on the most recent data (2001), downward departure rates vary from a low of 1.4 percent in the Eastern District of Kentucky to a high of 62.6 percent in the District of Arizona. See United States Sentencing Commission, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines 32 (2003) ("2003 Report"). Moreover, the Government itself is responsible for much of the lack of uniformity. Substantial assistance departures, available only upon the Government's motion, see U.S.S.G. § 5K1.1, accounted for 49 percent of all downward departures, 2003 Report at 60, and the rate

of such departures varied from above 35 percent in five districts to below seven percent in five districts, id. at 68. In addition, apart from substantial assistance departures, Government initiated departures accounted for more than one third of all other downward departures. Id. at 60.

Furthermore, the Government's charging decisions and presentations of facts contribute to many sentences that are markedly not uniform. To cite just one recent example within our Circuit, one defendant convicted of viewing child pornography on the Internet, who had not attempted to approach any children, received a Guidelines sentence of ten years, see United States v. Sofsky, 287 F.3d 122, 124 (2d Cir. 2002), and another defendant convicted of distributing child pornography over the Internet, who had solicited for sexual purposes a person he thought was a 13-year-old girl, received a Guidelines sentence of just under four years, see United States v. Maneri, 353 F.3d 165, 167-68 (2d Cir. 2003). See also United States v. Bonnet-Grullon, 212 F.3d 692, 706-08 (2d Cir. 2000) (rejecting departure despite lack of nationwide uniformity attributable to regional variations in prosecutors' plea-bargaining practices).

Wholly apart from these and other anomalies that pervade Guidelines sentencing, we think the Government's apprehension about the consequences of permitting a "cumulative effects" departure for overlapping enhancements at the higher end of the sentencing table is considerably overstated. In the first place, not many combinations of enhancements will be substantially overlapping, although the two

enhancements at issue in Lauersen will normally be an overlapping pair. Second, the departure is available only at the higher end of the sentencing table. Third, the extent of the departure can only diminish, and not eliminate, the added punishment caused by the overlapping enhancements. Finally, the decision whether to depart, and the extent of the departure, if made at all, remain within the discretion of the sentencing judge. Under these circumstances, there is no realistic "threat to erode the entire Guideline system."

We have previously recognized that, in some limited circumstances, a combination of enhancements can permit consideration of a downward departure. See United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996) (downward departure authorized where substantially enhanced sentence range results from a series of enhancements proven only by a preponderance of the evidence), amending 39 F.3d 42, 48 (2d Cir. 1994); cf. United States v. Concepcion, 983 F.2d 369, 387-89 (2d Cir. 1992) (downward departure authorized where enhancement based on acquitted conduct resulted in substantial increase in sentence); United States v. Rahman, 189 F.3d 88, 157-58 (2d. Cir. 1999) (downward departure authorized where sentence was lengthened by prosecutor's decision to add duplicative counts). In addition, we have approved, at the Government's urging, an upward departure in circumstances where a combination of enhancements did not fully reflect the degree of harm

inflicted upon a victim. See United States v. Kave, 23 F.3d 50, 53-54 (2d Cir. 1994).[12]

Although departure authority is not a device for subverting the Guidelines, see Bonnet-Grullon, 212 F.3d at 709, its restrained use in limited circumstances can provide appropriate flexibility in an elaborate sentencing regime that, however thoughtfully constructed, could not possibly anticipate all of the circumstances that might arise in its application. That is why the governing statute and the Guidelines themselves permit departures, even when a circumstance has been considered by the Commission, as long as that circumstance is present "to a degree" not adequately considered by the Commission. 18 U.S.C. § 3553 (b); U.S.S.G. § 5K2.0. We continue to believe that this limited leeway permits consideration of departures in the two pending cases, and we therefore adhere to out prior decisions.

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12 The Government relies on United States v. Kuhn, 345 F.3d 431, 436-38 (6th Cir. 2003), which rejected a downward departure based on the relationship between enhancements for abuse of trust, U.S.S.G. § 3B1.3, and leadership role, id. § 3B1.1. Those enhancements, although not entirely dissimilar, did not involve a substantial overlap.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of March two thousand four.

USA

v Dkt No: 01-1526(L), -1600 (XAP)

Lauersen

USA Dkt No: 02-1338

v

Jackson

[ENTERED: MARCH 25, 2004]

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee United States of America, and the petition for panel rehearing having been granted in an opinion filed March 24, 2004 adhering to the prior decisions,

IT IS HEREBY ORDERED that the pending petition for rehearing en banc is dismissed without prejudice to the filing of a subsequent petition for panel rehearing and petition for rehearing en banc, addressed to the opinion. Any subsequent petition for panel rehearing and suggestion for rehearing en banc must be filed 14 days from the date of this order. A party that has previously filed a petition for rehearing en banc may notify the clerk by letter than its previously filed petition for rehearing en banc should be recirculated to the Court, without the need for filing a revised petition for rehearing en banc.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

p o ccc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2002

Docket Nos. 01-1526 L, 01-1600 XAP

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

v.

NIELS LAUERSEN,
Defendant-Appellant-Cross-Appellee.

Argued: June 16, 2003
Decided: September 15, 2003
Amended: November 25, 2003
[Entered: November 25, 2003]

Before: NEWMAN, WINTER, and B.D. PARKER, JR., Circuit Judges.

Appeal and cross-appeal from the October 17, 2001, judgment of the United States District Court for the Southern District of New York (William H. Pauley III, District Judge), convicting the Appellant of health care fraud. Appellant primarily challenges District Judge's refusal to recuse. Government cross-appeals as to sentence.

Conviction affirmed; remanded for resentencing.

Alan M. Dershowitz, Cambridge, Mass. (Nathan Z. Dershowitz, Daniela Klare Elliott, Dershowitz, Eiger & Adelson, P.C., New York, N.Y.; Paul Schectman, Stillman & Friedman, P.C., New York, N.Y., on the brief), for Defendant-Appellant-Cross-Appellee.

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JON O. NEWMAN, Circuit Judge.

This appeal primarily concerns issues of judicial disqualification and sentencing. The disqualification issue arises because the trial judges owns stock in an insurance company that was among the victims of the defendant's fraud offense. The sentencing issue arises because an enhancement, claimed by the Government on its cross-appeal to apply, somewhat overlaps with another applicable enhancement, and that overlap might justify a downward departure. Niels Lauersen appeals form the October 17, 2001, judgment of the District Court for the Southern District of New York (William H. Pauley III, District Judge), and the Government cross-appeals. We conclude that disqualification was not required. With respect to the sentence, we conclude that the enhancement sought by the Government for affecting a financial institution and deriving more than $1,000,000 in gross receipts from the offense, see U.S.S.G. § 2F1.1(b)(8)(B) (2000), should have been applied, but that the application of this

enhancement will create a basis for consideration of a downward departure. We therefore affirm the conviction and remand for resentencing.

Background

In August, 2000, a twenty-two count indictment[1] was filed in the Southern District of New York against Niels Lauersen and Magda Binion.[2] The indictment charged Lauersen with mail fraud, 18 U.S.C. § 1341, health care fraud, 18 U.S.C. § 1347, making false statements relating to health care matters, 18 U.S.C. § 1035(a), conspiracy, 18 U.S.C. § 371, and witness tampering, 18 U.S.C. § 1512(b). Trial commenced on November 13, 2000, and ended January 9, 2001.

The trial evidence. The evidence established that between 1987 and 1995, Lauersen, and prominent New York City obstetrician/gynecologist, fraudulently obtained reimbursement from insurance companies for hundreds of fertility treatments he performed on patients whose insurance did not cover such treatments. Lauersen obtained reimbursement by misrepresenting to insurance companies the nature of the procedures he performed. Lauersen conspired with two anesthesiologists who assisted him, Magda

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1 A prior indictment was filed in 1998. Following a trial in 2000, a mistrial was declared after the jury failed to return a verdict.

2 Although the caption on Lauersen's briefs indicates that Magda Binion is participating in this appeal, we have no briefs from her, and the Government's brief states that only Lauersen is pursuing an appeal.

Binion and Neil Ratner, to make sure that insurance claim forms they submitted would also misrepresent the nature of the fertility treatments.

Louise Weidel, an employee of Lauersen's, prepared embryology reports between 1995 and 1997 concerning fertility treatments that Lauersen performed. A comparison of these reports with insurance claims and operation reports prepared by Lauersen between 1995 and 1997 revealed 221 surgeries that Weidel recorded as fertility treatments but that Lauersen billed as some other procedure. Weidel testified that she was aware that Lauersen was misrepresenting the nature of fertility procedures in operation reports and insurance claims, and that Lauersen did so only when fertility treatments were not covered by a patient's insurance plan.

Lisette Gonzalez, a secretary who worked in Lauersen's office, testified that Lauersen routinely supported his false insurance claims by ordering her to prepare correspondence and back-dated "office notes" that would give the appearance that patients had suffered gynecological emergencies around the time that Lauersen had actually performed fertility procedures on them. Gonzalez identified letters she had typed at Lauersen's request describing such "emergencies" and his treatment of them; Weidel's records confirmed that the patients named in these letters had in fact received fertility treatments.

Nine of Lauersen's former patients testified. The patients were shown the insurance claim forms filed by Lauersen on their behalf. In each instance, the

claim form represented that on certain dates Lauersen had performed covered, non-fertility treatments on the patient; the patient testified that the procedures performed by Lauersen on those dates were in fact fertility procedures. In each instance, the patient's testimony was corroborated by Weidel's embryology reports. Two patients testified that they were aware that Lauersen misrepresented to their insurance companies the nature of the procedures he had performed on them. Two of the patients testified that after they received grand jury subpoenas, Lauersen instructed them to lie to the grand jury about the pre-treatment symptoms they had experienced and the nature of the treatment they had received; both patients refused to comply.

The facts concerning other items of evidence and the disqualification challenge are set forth below in the discussion of the recusal and evidentiary issues.

The jury found Lauersen guilty on all counts that named him.

Sentencing. Applying the November 1, 2000, Sentencing Guidelines Manual, the Presentence Report ("PSR") calculated that Lauersen should be sentenced at an offense level of 33, which included upward adjustments of thirteen levels, pursuant to U.S.S.G. § 2F1.1 (b)(1)(N), for an intended loss of $4.9 million; two levels, pursuant to U.S.S.G. § 3B1.3, because Lauersen abused the trust of the victim insurance companies; and four levels, pursuant to U.S.S.G. § 2F1.1 (b)(8)(B), because Lauersen's offense "affected a financial institution" and he received more than $1 million in

gross receipts. At an offense level of 33, with a Criminal History Category of I, Lauersen's Guidelines range would have been 135 to 168 months' imprisonment. The PSR also recommended restitution in the amount of $3,274,606.

On October 15, 2001, Lauersen was sentenced. The Defendant objected to the proposed offense level adjustments for intended loss, abuse of trust, and "affecting a financial institution," and to the proposed amount of restitution. The District Court reduced the Probation Department's proposed loss and restitution figures slightly, finding an intended loss of $4,890,578 and ordering restitution in the amount of $3,240,597. The intended loss figure accepted by the Court remained within the range of the thirteen-level adjustment recommended in the PSR. The Court found that a two-level adjustment for abuse of trust was appropriate. The Court decided not to apply the recommended four-level enhancement for offense conduct affecting a financial institution because the Court ruled that insurance companies are not "financial institutions" for the purpose of U.S.S.G. § 2F1.1(b)(8)(B). Because the Court declined to apply this last adjustment, Lauersen's total offense level was calculated to be 29, which produced a sentencing range of 87 to 108 months. The Court sentenced Lauersen principally to 87 months' imprisonment.

Discussion

I. Recusal

The facts. The circumstances concerning the recusal issue are as follows. On June 6, prior to sentencing, Judge Pauley stated that he had determined that he "own[ed] a financial interest in at least one of the entities that is eligible for restitution" and that "as a matter of prudence, this Court may be required to disqualify itself" under 28 U.S.C. § 455(a). At a conference on June 12, Judge Pauley explained that, upon reviewing the PSR, he learned for the first time that the Equitable Insurance Company ("Equitable") was one of the companies Lauersen had defrauded and was thus eligible for restitution. Judge Pauley disclosed that he and his wife owned 400 shares in AXA Financial ("AXA"), the company to which Equitable had distributed its shares after demutualizing in 1992. Judge Pauley also disclosed that his wife held an annuity worth between $50,000 and $100,000 with prudential Insurance Company, which had been acquired by an entity entitled to restitution, and that his wife had owned shares of AT&T, a company entitled to restitution, but had divested herself of those shares in 1999.

Judge Pauley stated that his wife's annuity and prior shareholding did not constitute grounds for disqualification,[3] but that the AXA shares created an appearance of impropriety requiring disqualification under section 455(a). He directed the parties to "consider the matter and submit any motions for disqualification," and further announced that he intended to disqualify himself unless all parties waived objection to his continued participation. See Code of Conduct for United States Judges, Canon 3D (authorizing remittal of disqualification where impartiality might reasonably be questioned), reprinted in II Guide to Judiciary Policies and Procedures: Codes of Conduct for Judges and Judicial Employees I-7 (2003) ("Guide to Codes of Conduct"). He announced that he would use the remittal procedure recommended by the Judicial Conference of the United States, which states that party responses are "now shown to the judge" in the event of a non-unanimous result.[4] The Judge instructed the parties to

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[3] Although the Appellant's brief refers to the Judge's wife's annuity and her prior ownership of AT&T stock, Brief for Appellant at 17-18 & n.12, the brief makes no explicit contention that these circumstances required recusal, though it obliquely suggests that they "contributed to the appearance of impropriety." Id. at 18 n.12. The suggestion is without merit. Status as an annuitant, even if the annuity is payable by a party, is not a basis for recusal, Maier v. Orr, 758 F.2d 1578, 1582 (Fed. Cir. 1985), nor is the wife's previous ownership of shares that were sold before either of the Appellant's trials.

[4] The remittal procedure is set forth in a "NOTICE CONCERNING WAIVER OF JUDICIAL DISQUALIFICATION," approved by the Judicial Conference in September 1985. See Guide to Codes of Conduct, Commentary to Canon 3, at I-10.

submit to the Clerk of the Court letters indicating whether each would object or waive objection to his continued participation.

The parties submitted their responses to the Clerk of the Court, and the result was not unanimous. At a hearing on July 10, 2001, the Government requested permission to brief its argument that Judge Pauley's connection with the AXA shares did not require disqualification; the defense objected on the ground that the waiver process had been completed and that any further argument on the matter would threaten to reveal the positions taken by the parties regarding waiver of disqualification. Judge Pauley obliquely suggested that recusal might not be necessary if the Government declined to pursue restitution on behalf of AXA, but later stated that

> further briefing or discussion on the issue would merely spawn more litigation in this matter, and because, I cannot in a timely fashion divest myself of AXA Financial, I believe that I am compelled to recuse myself based on the finding under 455(a).... I think that the best course is for the matter to be swiftly reassigned to another judge and I will take the appropriate steps tomorrow morning to start that process.

On July 11, the Government moved for reconsideration of Judge Pauley's decision to recuse. The Government argued that Judge Pauley was mistaken in concluding that a financial interest in a

non-party victim must result in his disqualification absent unanimous waiver. On July 17, the Government submitted a letter in support of its motion for reconsideration, informing the Court that the Government had decided, in consultation with AXA, to withdraw any claim for restitution on behalf of AXA. In an Order entered July 30, 2001, the Court stated that, conditional on the filing of certain further representations to the effect that restitution would not be sought on behalf of AXA, "recusal is not required," and further stated that the Court's decision was "based entirely on the changed circumstances reflected in the Government's July 17, 2001, letter."

Section 455(a). Section 455(a) of Title 28 provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Disqualification under section 455(a) requires a showing that would cause "an objective, disinterested observer fully informed of the underlying facts [to] entertain significant doubt that justice would be done absent recusal." In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001) (citation and internal quotation marks omitted) (alternation in original); see Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 858-62 (1988); United States v. Bayless, 201 F.3d 116, 127-28 (2d Cir. 2000). This section is the sole basis for the Appellant's challenge to Judge Pauley's participation in the pending case. No claim is made that the Judge should have recused himself pursuant to section 455(b)(4) of Title 28, which requires disqualification if a judge or certain family members have a "financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could

be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). Thus, the Appellant makes no claim that Judge Pauley had "a financial interest in the subject matter in controversy,"[5] or that a victim of a criminal fraud is a "party" in the criminal case within the meaning of section 455(b).

The Appellant advances several arguments as to why Judge Pauley was required to recuse himself under section 455(a). We consider each contention.

Ownership of AXA shares. The Appellant's principal contention is that Judge Pauley's impartiality could reasonably be questioned because of his and his wife's ownership of 400 shares of AXA Financial, one of the many insurers with a claim for restitution as a result of the Appellant's fraud. We have ruled, applying a prior version of section 455, that ownership of a small amount of the stock of the victim of a crime (bank robbery) did not disqualify a judge from presiding at a criminal trial. United States v. Ravich, 421 F.2d 1196, 1205 (2d Cir. 1970) (Friendly, J.).[6] In that case, the judge's shares amounted to .0072 percent of the outstanding shares of the victim bank. Although section 455 at that time required recusal if a judge had

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5 Judge Pauley had an interest in AXA, not in the $13,000 that AXA might have received as restitution. See United States v. Nobel, 696 F.2d 231, 235-36 (3d Cir. 1982) (judge owning shares in crime victim does not have interest in "the subject matter in controversy").

6 The version of section 455 applicable when Ravich was decided required that a judge "disqualify himself in any case in which he has a substantial interest." 28 U.S.C. § 455(1970).

a "substantial interest" in the case, Judge Friendly observed that the judge's interest "was not merely unsubstantial but nonexistent." In the pending case, Judge Pauley's and his wife's shares of AXA represent .00009 percent of the victim insurer's stock. That slight interest, even less significant than the interest termed "nonexistent" in Ravich, would not cause an objective observer to question Judge Pauley's impartiality, once that observer became aware that AXA, a company worth $5.8 billion, had a restitution claim for only $13,046.

After section 455 was amended to require recusal when a judge's impartiality could reasonably be questioned, two circuits ruled that ownership of a small percentage of shares of a crime victim did not meet the section 455(a) standard for recusal. United States v. Rogers, 119 F.3d 1377, 1384 (9th Cir. 1997) (judge was one of millions of shareholders of defrauded bank); United States v. Sellers, 566 F.2d 884, 887 (4th Cir. 1977) (judge and family owned less than .04 percent of stock of robbed bank); see United States v. Nobel, 696 F.2d 231, 235-36 (3d Cir. 1982) (recusal required where judge had "substantial" interest in crime victim).

We recognize that the Judicial Conference's Advisory Committee on Codes of Conduct has informally advised that, at least in some circumstances, a judge should recuse if the judge or the judge's spouse owns stock in a crime victim who may be entitled to restitution. That advice is briefly noted in a compendium of summaries of informal confidential opinions given by the Committee in response to judicial inquiries. See Guide to Codes of Conduct, Ch.

5, Compendium of Selected Opinions ("Compendium), § 3.1-6[7].[7] Judge Pauley referred to the advice in the Compendium in making his initial decision to recuse.

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[7] The Compendium collects only summaries of the informal, unpublished opinions issued by the Advisory Committee. The Committee also issues formal, published opinions, stating all the pertinent circumstances submitted by the judge who sought the Committee's opinion and providing the Committee's rationale for its advice.

At oral argument of this appeal, when counsel for the Appellant was asked, "You can't obtain the published opinion of the Committee o[n] the Codes of Conduct?" he replied, "We are told that the Committee- - the texts of the opinions are available only to judges and not to the general public." (Transcript supplied by letter from Appellant's counsel, Sept. 26, 2003). In fact the published opinions are contained in volume II of the Guide to Judiciary Policies and Procedures - - Codes of Conduct for Judges and Judicial Employees ("Guide to Codes of Conduct"), and we are advised by the Office of the General Counsel of the Administrative Office of the United States Courts ("AO") that the Guide to Codes of Conduct, though not available online, is not a confidential document and is available in many libraries. The library of the Harvard Law School advises that it has a copy.

Appellate counsel's Sept. 26 letter includes the affidavit of an associate reporting that she endeavored to obtain a copy of the Compendium "so that [counsel] could review Judge Pauley's quotation to it." The letter asserts that the edition of the Compendium cited by Judge Pauley - - the 2001 edition - - is not available at the Harvard Law Library. However, the letter includes a letter from the Library stating that, although the Library does not have supplements to the Guide to Codes of Conduct issued after November 2000, its copy is up to date through transmittal No. 16, issued in November 2000. The AO advises that the passage from the Compendium quoted by Judge Pauley was included in transmittal No. 11, issued in May 1997. The Harvard Law Library confirms that Judge Pauley's quotation from the Compendium is included in the Library's copy of the Guide to Codes of Conduct.

We have considered the view of the Advisory Committee and believe it should not be taken as suggesting that recusal is required under section 455(a) in every criminal case where a judge has an interest in a crime victim entitled to restitution. See In re National Union Fire Insurance Co. of Pittsburgh, Pennsylvania, 839 F.2d 1226, 1231 (7th Cir. 1988) (declining to agree with Advisory Committee's informal opinion interpreting remittal of disqualification provision of Canon 3D). First, the Advisory Committee acknowledges that it does not purport to construe the disqualification statutes, but advises only with respect to construe the disqualification statutes, but advises only with respect to the Code of Conduct. See Guide to Codes of Conduct at IV-125 (Advisory Opinion No. 57). Second, as we have noted, courts construing section 455(a) have ruled that a judge who has an interest in a crime victim need not recuse unless that interest is substantial. Third, section 455 and the Code both provide that any interest in a party requires recusal. 28 U.S.C. § 455(b)(4); Guide to Codes of Conduct at I-6, Canon 3(C)(1)(c). This rejection of a de minimis approach to stock ownership of a party suggest that an insubstantial interest in a non-party, even one with some relationship to the case, is not an automatic basis for recusal. See Liljeberg, 486 U.S. at 860 n.8 ("§

If counsel was endeavoring to assert the unavailability of the unpublished opinion underlying the summary in the Compendium quoted by Judge Pauley, that document is not available to the public or to judges generally, but only to the judge who submitted an inquiry to the Committee on Codes of Conduct.

455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety."); cf. National Union, 839 F.2d at 1229 ("The care with which [the provisions of section 455(b)(5)] are drafted should make a court hesitate to treat the general language of § 455(a) [concerning disqualifying family relationships] as a bar to judicial service whenever a relative has 'something to do with' a party...."). Finally, we note that, because the advice in the Compendium contains only a summary of a confidential response to a judge's inquiry and not the full text of a published opinion by the Advisory Committee, the Compendium does not disclose the details of either the inquiring judge's stock ownership or any other facts that would bear on the substantiality of the judge's interest in relation to the facts of the case.

For all of these reasons, we decline to adopt a per se rule requiring recusal in every instance where a judge has an interest in the victim of a crime. Instead, we believe that recusal is required only where the extent of the judge's interest in the crime victim is so substantial, or the amount that the victim might recover as restitution is so substantial, that an objective observer would have a reasonable basis to doubt the judge's impartiality. Neither Judge Pauley's minuscule holding of AXA shares nor the $13,046 that this large

company was originally entitled to claim as restitution meet that standard.[8]

AXA's wavier of its restitution claim. Ultimately Judge Pauley decided not to recuse because AXA informed the Government that it would wave any claim for restitution. The Appellant contends that relinquishment of claim for restitution cannot remove an otherwise existing basis for recusal. The Appellant points out that subsection 455(f) explicitly creates an opportunity for a judge owning stock of a party to avoid recusal by selling the stock in circumstances where the judge was previously unaware of the stock

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[8] The Appellant endeavors to support his arguments for recusal of Judge Pauley by pointing out that the judges of this Court previously assigned to hear this appeal recused. As those judges stated in an order filed May 13, 2003, "The members of the panel...having reviewed the victim list in the Presentence Report, have determined that they are confronted with an analogous issue." United States v. Laurensen, No. 01-1526L, Amended Order (2d Cir. May 13, 2003). However, their reason for recusal does not support the argument for Judge Pauley's recusal. The issue for him was whether his stock ownership in a crime victim created a reasonable bias for questioning his impartiality to proceed with the case. The issue for the prior panel members was whether their stock ownership in a crime victim created a reasonable basis for questioning their impartiality to decide the issue of whether a trial judge's stock ownership in a crime victim creates a ground for recusal under section 455(a). Had they not recused because of their stock ownership, an observer could have reasonably concluded that they had prejudged the issue of whether Judge Pauley should have recused. As the appellate judges stated, "The panel has concluded that...to review the actions of the district judge could raise questions about the appearance of the absence of impartiality." Id. (emphasis added)

ownership at the start of the litigation,[9] and had already devoted substantial time to the litigation. 28 U.S.C. § 455(f); See Guide to Codes of Conduct at I-7, Canon 3 (C) (4) (parallel provision to subsection 455(f)). In the Appellant's view, section 455(f) carries a negative implication that no other technique can eliminate an otherwise disqualifying circumstance. We disagree.

Section 455(f) provides an explicit means of eliminating the basis for recusal otherwise required by the strict requirement of section 455(b)(4). There is no reason to read into subsection 455(f) a negative implication that precludes elimination of a circumstance that could require disqualification under the more general "appearance of partiality" standard of subsection 455(a). We have previously approved a judge's elimination of a possible basis for a section 455(a) recusal by selling stocks that made the judge a putative member of a plaintiff class. In re Certain Underwriter, 294 F.3d 297, 306 (2d Cir. 2002); see S.I. Groves & Sons Co. v. International Brotherhood of Teamsters, 581 F.2d 1241, 1246-48 (7th Cir. 1978) (basis for section 455(a) recusal because judge's brother was senior partner of firm representing plaintiffs eliminated by withdrawal of brother's firm). Moreover, the Advisory Committee, in its Compendium, has twice endorsed elimination of a basis for recusal under circumstances not covered by subsection 455(f). One

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9 One obvious example would arise if a judge inherited the stock during the litigation.

judge was advised that he could avoid recusal because of stock ownership in a party in a class action by electing to opt out of the class. Compendium § 3.1-6[4](c), (e). Another judge, who was concerned about recusal because of the connection of a law clerk to the case, was advised that recusal could be avoided by isolating the law clerk from any work on the case. Id. § 3.5.

Even if Judge Pauley's ownership of AXA shares had provided a basis for recusal, we see no valid reason why AXA's decision to forgo its restitution claim would not have sufficed to eliminate such a basis.

Reconsideration of recusal. The Appellant contends that, once Judge Pauley decided to recuse, he could not reconsider his decision, even if that decision was not initially required. In effect, the Appellant views the Judge's initial decision as an irrevocable relinquishment of jurisdiction. As a general matter, any interlocutory ruling can be reconsidered prior to the entry of a final judgment. Fed. R. Civ. P. 54(b). Even a ruling that a judge lacks subject matter jurisdiction can be reconsidered and revised. See, e.g., Walsh v. McGee, 918 F. Supp. 107, 113 (S.D.N.Y. 1996). There is no reason to prohibit a judge from reconsidering a recusal decision, at least in the absence of transfer of the case to another judge. See United States v. Dalfonso, 707 F.2d 757, 759 (3d Cir. 1983) (judge announced decision to recuse and subsequently

vacated recusal order). But see Doddy v. Oxy USA, Inc., 101 F.3d 448, 456-58 (5th Cir. 1996); El Fenix de Puerto Rico v. M/Y Johanny, 36 F.3d 136, 141-42 (1st Cir. 1994).

An example will demonstrate the lack of merit in the Appellant's contention. Consider a judge who announces that he will recuse because his wife owns stock in one of the parties. Later that day his wife informs him that she sold that stock months ago. No one could seriously maintain that the judge could not reconsider and revise his initial decision to recuse. We note that the Compendium explicitly approves a judge reversing the judge's recusal decision "if it becomes apparent that recusal was unnecessary and should not have occurred." Compendium, § 3.8-2[1](b).

The remittal procedure. The Appellant contends that, whether or not Judge Pauley was obliged to recuse because of the AXA shares, his recusal was required because the anonymity contemplated by the remittal procedure was not preserved. To implement the remittal of disqualification procedure authorized by Canon 3D, the Advisory Committee has recommended a remittal procedure and provided a form of notice, approved by the Judicial Conference of the United States. See Guide to Codes of Conduct I-10 (NOTICE CONCERNING WAIVER OF JUDICIAL DISQUALIFICATION). The recommended procedure contemplates that the judge will inform the parties of the circumstances that require recusal under section 455(a) and advise each party to inform the Clerk

whether or not there is objection to the judge's continued participation. In the event that all parties express no objection, the basis for recusal is said to be "remitted." If any party objects, the judge recuses. The Clerk is instructed not to inform the judge of the identity of the objecting party. Id.; see Hardy v. United States, 878 F.2d 94, 98 n.5 (2d Cir. 1989) (describing remittal procedure).

In the pending case, Judge Pauley initiated the remittal procedure but became aware that the Appellant had not agreed to his continued participation.[10] We see no reason why this circumstance should entitle the Appellant to any relief. The procedure for maintaining anonymity of the objecting party during the remittal process is not required by statute, rule, or even the Code of Conduct for United States Judges, but is simply a recommendation of the Advisory Committee. Furthermore, although non-disclosure of the identity of the objecting party is preferable, that party has no enforceable entitlement to anonymity. It has never been suggested that a party who unsuccessfully moves to disqualify a judge has any basis to require recusal simply because the judge is aware that the party sought his recusal. See Hardy, 878 F.2d at 98 (formal motion normally required to preserve disqualification claim "despite the discomfort counsel may feel in

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[10] The Government contends that the Appellant acquiesced in the procedure that apprised Judge Pauley of the Appellant's refusal to waive disqualification. We find it unnecessary to assess this claim.

making it"). Although disclosure of the identity of a party moving for disqualification is unavoidable whereas the remittal procedure contemplated by the Advisory Committee can preserve the anonymity of a party declining to remit the disqualification, we do not believe that identification of the objecting party itself creates a basis for reasonably questioning the judge's impartiality or otherwise precludes the judge's continued service.

Finally, we note that in the typical situation where remittal is sought and one party objects, the judge will recuse; non-disclosure of the objecting party is recommended, not to protect the objecting party in the case from which the judge recused, but in future cases where that party might appear before the same judge and might, perhaps unreasonably, apprehend hostility from the judge. In the pending case, the Judge reconsidered the recusal decision and properly determined not to recuse. The Judge's awareness that Appellant would not have consented to remittal, had recusal otherwise been warranted, is not a basis for any relief. See National Union, 839 F.2d at 1231 (rejecting Advisory Committee's view that recusal was required where judge, not required to recuse, sought "observations of counsel," learned of a party's objection, and continued to participate).

In sum, all of the Appellant's contentions concerning recusal are without merit. [11]

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[11] Even if recusal were required, it would pertain only to the sentencing phase of the case. The reason requires some elaboration.

The Supreme Court has noted that recusal under subsection 455(a) "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." Liljeberg, 486 U.S. at 860. In Liljeberg, even though the trial judge had stated that he had forgotten the transaction between the university on whose board he served and one of the parties in the litigation before him, the Court of Appeals ruled, and the Supreme Court agreed, that a reasonable observer "would expect" that the trial judge would remember the transaction. Id. at 852.

In the pending case, however, no reasonable basis existed for Judge Pauley to be aware that his ownership of AXA shares might create a basis for recusal until after the conclusion of the trial when he read the PSR and learned for the first time that Equitable, and therefore AXA Financial, was eligible for restitution. AXA had become the successor to Equitable's interest when Equitable demutualized. Neither Equitable nor AXA was mentioned in the indictment or in any testimony at the first trial; Equitable was mentioned in two consecutive questions asked by defense counsel during cross-examination of the case agent at the second trial. The questioning concerned $4,900 billed to Equitable for a culdoscopy procedure. Not surprisingly, these fleeting references did not alert Judge Pauley to the possibility of a basis for recusal because of his ownership of AXA shares. Apart from the PSR, the only other reference to Equitable was in Exhibit GX 500, in which Equitable was mentioned twice among 616 entries. In this respect, this case significantly differs from Chase Manhattan Bank v. Affiliated FM Insurance Co., 343 F.3d 120 (2d Cir. 2003), in which we ruled that a reasonable person would consider a trial judge to have known that a plaintiff bank had merged with a bank in which the judge owned shares. Among the pertinent circumstances was the identification of the bank under its old and new name in the judge's findings of fact. See id. at 130.

II. Evidentiary Issues

Tina O'Grady's Testimony. As part of the investigation that led to Lauersen's indictment, the FBI searched Lauersen's offices in 1997. Tina O'Grady, one of Lauersen's former patients, testified that on a visit to Lauersen's office after the FBI search she noticed that her patient file was much thinner than it had been on her previous visit. She told the nurse that the nurse had the wrong file. She testified that the nurse replied that the file was a replacement for O'Grady's original file, which along with "many others, was destroyed, anything having to do with infertility." The nurse told O'Grady that Lauersen's office "had a tip, therefore, they destroyed the files before the government agency came in to confiscate" them.

The Court admitted O'Grady's testimony recounting the nurse's statements under Fed. R. Evid. 801(d)(2)(D) (agency admissions) and possibly 801(d)(2)(E) (co-conspirator statements).[12]

Thus, recusal, if required at all, would have been required only with respect to proceedings after Judge Pauley became aware of Equitable's claim for restitution, and at that point only sentencing remained. However, at oral argument of this appeal, counsel for the Appellant acknowledged that, if we were to determine that the only available relief was a remand for resentencing before a different judge, the Appellant expressly disclaimed such a remedy.

[12] The District Court did not make clear which hearsay exception it was relying on, but stated that the evidence was admissible under Rule 801(d)(2)(D) "more easily" than under Rule 801(d)(2)(E).

The Appellant challenges O'Grady's account of the nurse's statements as beyond the scope of the hearsay exception for statements by an agent of a party-opponent concerning matters within the scope of agency or employment, Fed. R. Evid. 801(d)(2)(D). He argues that "file purging" was not within the scope of the nurse's employment. However, as the Government responds, because nurses in Lauersen's office were responsible for helping maintain patient files, the condition and content of a patient's file were subjects properly within the "scope of employment" for the purpose of this rule. The statements relate to patient files, and the nurse had "authority to take action," Pappas v. Middle Earth Condominium Association, 963 F.2d 534, 538 (2d Cir. 1992), regarding patient files. In any event, it was surely within the scope of the nurse's employment to assure a patient that a file being examined was the patient's and to provide an explanation to allay the patient's justifiable doubts.

The Appellant also contends that the nurse's statement was inadmissible hearsay because there was no evidence to establish that the nurse had "personal knowledge" of the substance of her statements. However, the nurse's personal knowledge was readily inferable from her statement that "we destroyed your file." In any event, we have not required personal knowledge for statements by a party's agent. See id. at 537.

Ratner's Testimony and Government Exhibits 70 and 500. Ratner, testifying pursuant to a cooperation agreement with the Government, reported that in 1987 he began providing anesthesia when Lauersen

performed surgery. Ratner testified that Lauersen explained to him that because fertility treatments usually were not covered by patients' insurance, he and Ratner would bill them as other types of procedures, and that Ratner's paperwork in connection with these special cases should not mention anything about the fertility treatments actually performed. Ratner testified that from 1987 to 1997, he and Lauersen billed all fertility surgeries that were not covered by insurance as covered, non-fertility gynecological services. Ratner estimated that Lauersen performed between 100 and 200 fertility surgeries a year during this period, and that 95 percent of these were not covered by insurance and thus were falsely billed.

The Government introduced three sets of Ratner's anesthesiology charts for the years 1987-1997: GX81, a set of records from part of 1989 maintained by Ratner at "[his] place in New York"; GX90, a set of records from 1990 to 1997 maintained by Ratner at his "home office"; and GX70, a set of records from 1989 to 1997 maintained by Warrens Transactions ("Warrens"), a record-keeping business operated by Ratner's father. Every week Ratner sent copies of his anesthesiology charts and operative reports to Warrens. He taught his father how to assemble, maintain, and file the "billing packets" that included Ratner's anesthesiology charts and reports. He visited Warrens and observed his father's work to ensure that these procedures were followed.

Ratner testified that in order to disguise in his records the true nature of the fertility procedures, he devised a code that he used for describing fertility procedures in his anesthesiology charts. Apparently relying on the set of records introduced as GX70, FBI Agent Michael Bertrand testified that he entered data from the records into a computer and searched the entered data for incidents that, applying Ratner's code, would indicate a fraudulently billed fertility treatment.[13] In this way, the Government identified 395 such procedures performed by Lauersen between 1989 and the end of 1994. A summary chart, GX500, listed 616 procedures that the Government contended were fraudulently billed; the 395 procedures identified for the period 1987 to 1994 using the analysis of Ratner's records and the 221 procedures identified for the period 1995 to 1997 using Weidel's embryology reports.

The Appellant objected to GX70, and also to GX500 because it was based in part on GX70. It is unclear what the grounds for objection were; counsel conceded that "[t]his is not a business records objection I'm making," but a "chain of custody" objection, and appeared to rely primarily on the authentication provisions contained in Fed. R. Evid. 901 and 902. The Court admitted GX70 conditionally:

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13 Agent Bertrand testified that by comparing Ratner's charts for the period 1995 to 1997 with Weidel's embryology records from the same period, he determined that Ratner's code was more than 95 percent reliable in distinguishing misrepresented fertility treatments from real non-fertility procedures.

> While the government has established a sufficient foundation that [GX70] contains records of regularly conducted business activity and there's no objection to that effect, they've not established a chain of custody.... Accordingly, I'm going to admit GX70 conditionally... with the understanding that the government is going to provide a declaration showing the chain of custody.

The Government later submitted the affirmation of FBI Special Agent Michael Porzio. Porzio affirmed that Ratner's father, Marvin Ratner, had produced the documents contained in GX70 in response to a subpoena and that the documents had been faithfully maintained during the time they were in Government custody. Following submission of this affirmation, defense counsel renewed his objection, contending that the affirmation was insufficient to satisfy the requirements of the business record exception of Fed. R. Evid. 803(6) or the authentication provisions of Fed. R. Evid. 901 or 902. The Court ruled that the Government had "made out its prima facie case" and refused to exclude the evidence.

The Appellant contends that GX70 was improperly admitted, and that GX500, the summary table based in part on GX70, should therefore also have been excluded. To the extent that the Appellant challenges the "chain of custody," we agree with the Government that "chain of custody" was adequately established by Agent Porzio's declaration. As to the objection of lack of certification or testimony of a

custodian or qualified person, we agree with the Government that Ratner was qualified to lay a foundation under Rule 803(6) and that the father's testimony was not required. The term "custodian or other qualified witness" in Rules 803(6) and 902(11) ("qualified person") is generally

> given a very broad interpretation. The witness need only have enough familiarity with the record-keeping system of the business in question to explain how the record came into existence in the ordinary course of business.

5 Weinstein's Federal Evidence § 803.08[8][a], at 803-77 (2d ed. 2003); see Phoenix Associates III v. Stone, 60 F.3d 95, 101 (2d Cir. 1995). Ratner, who testified concerning the record-keeping procedures of his father's business, was sufficiently familiar with those procedures for purposes of Rule 803(6) because he personally designed them and observed them being properly implemented. Because Rule 803(6) was satisfied by Ratner's testimony, Rule 902(11) certification and notice were unnecessary. See 5 Weinstein's Federal Evidence, § 803-08[8][b] at 803-82 ("Instead of providing live testimony from a custodian or other qualified witness, the proponent of business records may choose to present the foundation by a certification that complies with Rule 902(11)....") (emphasis added). The billing records were produced to the Government by Warrens, and Ratner sufficiently demonstrated that Warrens maintained billing records in such a way that they could be reliably admitted as

business records. Because GX70 was admissible, GX500 was also admissible.

III. Sentencing Issues

1. Estimation of Fraud Loss

The Appellant challenges the thirteen-level upward adjustment for an intended loss of $4.9 million, contending that GX500, which supported an even larger figure, was unreliable. The $4.9 million intended loss figure, which the Probation Office called "a ... conservative estimate," was based primarily on the amount requested by Lauersen from insurers for procedures listed on GX500. The District Court's finding that GX500 was reliable was a factual determination, entitled to considerable deference on appeal. To the extent that GX500 was compiled by reference to the code Ratner provided, a cross-check against the records of Weidel demonstrated that Ratner's code was reliable. Moreover, the estimation of intended loss derived from Ratner's testimony and other admissible evidence would have supported at least the same upward adjustment for intended loss as the Court applied. [14]

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[14] The Government submitted a sentencing memorandum in which it observed that, without relying at all on GX500, an intended loss estimate of $6.7 million could be extrapolated from the testimony of Ratner and Weidel, and an intended loss estimate of $6 million could be extrapolated from a comparison of Weidel's embryology reports with Lauersen's insurance claim forms.

2. Enhancement for Abuse of Trust

While recognizing that the Court of Appeals has approved abuse-of-trust enhancements where physicians were convicted of overbilling insurance programs, see United States v. Ntshona, 156 F.3d 318, 321 (2d Cir. 1998), the Appellant argues that here there was no trust relationship to abuse because "the insurance companies reposed no trust in [Lauersen]; repeatedly questioning claims he submitted." Brief for Appellant at 74. The argument lacks merit. The insurance companies apparently trusted Lauersen enough to reimburse him for millions of dollars in claims he submitted over the ten year period during which his fraud continued. Furthermore, if the companies began not to trust Lauersen, it was because they correctly suspected that he was abusing their trust.

3. Enhancement for Conduct Affecting a Financial Institution

The Government cross-appeals from the District Court's decision not to apply a four-level upward enhancement, pursuant to U.S.S.G. § 2F1.1(b)(8)(B). The enhancement applies if the offense "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense." Id. The District Court concluded that insurance companies do not qualify as "financial institutions" for purposes of subsection 2F1.1(b)(8)(B).

The District Court's view of section 2F1.1(b)(8)(B) runs directly counter to the Commission's view as expressed in Application Note 19 to section 2F1.1. That note specifically lists "insurance company" among the types of institutions included within the guideline's definition of "financial institution." Since the District Court ordered restitution of more than $3 million, the Court necessarily determined that Appellant derived more than $1 million in gross receipts from the offense. The four-level enhancement required by section 2F1.1(b)(8)(B) should have been imposed. [15]

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[15] In rejecting the enhancement, the District Court relied on the decision of a divided panel of the Seventh Circuit in United States v. Tomasino, 206 F.3d 739 (7th Cir.), reh'g denied, 230 F.3d 1034 (7th Cir. 2000), which declined to consider a pension fund to be a "financial institution" for purposes of subsection 2F1.1(b)(7)(B) (Nov. 1, 1998). The Seventh Circuit reasoned as follows. The commentary to section 2F1.1 states that subsection 2F1.1(b)(7)(B), which was renumbered as subsection 2F1.1(b)(8)(B) in the Nov. 1, 2000 Guidelines Manual, implements Congress's instruction to the Commission in section 2507 of Public Law 101-647; that section requires increased punishment for those who derive more than $1 million from fraud affecting a "financial institution" as that term is defined in 18 U.S.C. § 20; section 20 does not include a pension fund within its definition of "financial institution." The Seventh Circuit concluded that the Commission might have included pension funds within the definition of financial institutions only because of a mistaken view that Congress instructed it to do so. Because section 20 also does not include an insurance company within its definition of "financial institution," Lauersen urges us to adopt the reasoning of Tomasino and conclude that the Commission might have included insurance companies because of a mistaken view that Congress instructed it to do so.

Although the sentence must be remanded for resentencing with the adjusted offense level increased from 29 to 33, that increase creates a new circumstance that might well justify a downward departure to some extent. Lauersen's offense level has already been increased 13 levels because of the large amount of money involved in his fraud. The subsection 2F1.1(b)(8)(B) enhancement will add an additional 4 levels in large part because the proceeds of the fraud exceed $1 million. This cumulation of enhancements is not impermissible double-counting because the dollar-amount enhancement of subsection 2F1.1(b)(1)(N) and the "financial institution" enhancement of subsection 2F1.1(b)(8)(B) serve different purposes. See United States v. Campbell, 967 F.2d 20, 25 (2d Cir. 1992) ("[D]ouble counting is legitimate where a single act is relevant to two dimensions of the Guidelines analysis."). Nevertheless, there is substantial overlap between the two enhancements; the large amount of money involved in the fraud significantly triggers both of them. And at the upper ranges of the sentencing table, the cumulative effect of enhancements has a significant effect upon the applicable sentencing range. See United States v. Sofsky, 287 F.3d 122; 124 n.1 (2d Cir. 2002). In Lauersen's case, the four-level enhancement from level 29, required by subsection 2F1.1(b)(8)(B), increases the minimum of his sentencing

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We think Judge Easterbrook's dissent in Tomasino properly rejects the argument, whether applied to a pension fund or an insurance company. The language of Application Note 19 is entirely clear as to the scope of subsection 2F1.1(b)(8)(B). We note, in addition, that the Commission subsequently rejected the ruling in Tomasino. See U.S.S.G. app. C, amend. 617, at 184 (Supp. 2001).

range by four years, whereas that same four-level enhancement from level 13, for example, would result in an increase in the minimum of the sentencing range of only 12 months. U.S.S.G. Ch. 5, Pt. A (Sentencing Table).

We recognize that the Guidelines permit the use of a subsection 2F1.1(b)(8)(B) enhancement in addition to a subsection 2F1.1(b)(1)(N) enhancement. Nevertheless, we think that the cumulation of such substantially overlapping enhancements, when imposed upon a defendant whose adjusted offense level translates to a high sentencing range, presents a circumstance that is present "to a degree" not adequately considered by the Commission, see 18 U.S.C. § 3553(b)(1), and therefore permits a sentencing judge to make a downward departure. Cf. United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996) (downward departure authorized where substantially enhanced sentence range results from a series of enhancements proven only by preponderance of the evidence), amending 39 F.3d 42, 48 (2d Cir. 1994).

Upon remand, therefore, the District Judge must impose the subsection 2F1.1(b)(8)(B) enhancement, but may exercise discretion to mitigate the effect of the enhancement by making a downward departure. [16]

Conclusion

The conviction is affirmed. The case is remanded for resentencing not inconsistent with this opinion.

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[16] We note that Congress has recently added a new subsection (g) to 18 U.S.C. § 3742 to limit the authority of a district court to impose a sentence outside the applicable guidelines range upon a remand from a court of appeals. See PROTECT Act, P.L. 108-21, § 401(e), 117 Stat. 650, 671 (2003). Amended subsection 3742(g)(2)(A) provides that, upon remand, a sentence outside the guidelines may be imposed only on a ground that "was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal."

Even if this new provision is applicable where the original sentence was imposed prior to the effective date of the amendment, a matter we need not decide, the new provision cannot logically apply in this case. Because the District Court did not impose a subsection 2F1.1(b)(8)(B) enhancement, the basis for a "cumulative effect" departure did not exist at Lauersen's initial sentencing. The possibility of such a departure arises now only because the Government has successfully appealed the sentence and obtained a remand for recalculation of the applicable guideline range. The purpose of the new subsection 3742(g) is to "prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory." H.R. Conf. Rep. No. 108-66, at 59 (2003), reprinted in 2003 U.S.C.C.A.N. 683, 694. In this case, the District Court did not make any departure.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 27th day of May, two thousand three.

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

v. 01-1526L, -1600XAP, -1686XAP

NIELS LAUERSEN a/k/a Niels H. Lauersen, and MAGDA BINION,
Defendants-Appellants-Cross-Appellees.

[Entered: May 13, 2003]

ORDER

Upon consideration of the Appellant's motion filed May 6, 2003, the Court rules as follows:

1. With respect to the request for disclosure of the "reason or reasons" for the disqualification of the members of the panel who heard the original appeal, that request has become moot as a result of the prior panel's entry of an amended order on May 13, 2003.

2. With respect to the request for disclosure of the process by which the members of the new panel were selected, the Clerk's Office sent to all the judges of the Court a sheet listing the parties in the case, counsel, and, prompted by the Appellant's brief, the names of various companies on a list captioned "Victim Insurer"; the sheet provided the customary blanks for the recipients to indicate whether they were disqualified from hearing the appeal. The Clerk's Office then assigned the appeal to the next regularly scheduled panel on which three judges of those who indicated that they were not disqualified were already assigned to sit.

3. The motion for bail is denied.

FOR THE COURT,
ROSEANN B. MacKECHNIE, Clerk

By /s/Lucille Carr
Lucille M. Carr, Operations Manager

* * *

5/13/03 AMENDED Order filed stating: This case involves in part a review of a district judge who identified the appearance of a potential conflict. The members of the panel which heard oral argument in this case on November 4, 2002, having reviewed the victim list in the Presentence Report, have determined that they are confronted with an analogous issue. The panel has concluded that in that circumstance to review tha actions of the district judge could raise questions about the appearance of the absence of impartiality. Thus, in the exercise of their discretion to disqualify themselves, the panel does not purport to reach or decide any of the substantive issues presented on appeal, including the issue of whether the district court judge properly exercised his own discretion in the face of the appearance of a potential conflict of interest. Accordingly, reargument in this case has been set for June 16, 2003 before a different panel. Judge Miner, having recused himself by virtue of the previous order, declines to join in this Amended Order. FOR THE COURT: CA

* * *

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of May, two thousand and three.

Present:

Hon. Richard J. Cardamone,
Hon. Roger J. Miner,
Hon. Robert A. Katzmann,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

v. Docket No.[s]: 01-1526 L, 01-1600 xap,
01-1617 con*, 01-1686 xap

NIELS LAUERSEN, also known as Niels H. Lauersen,
MAGDA BINION,
Defendants-Appellants-Cross-Appellees.

[Entered: May 1, 2003]

ORDER

The members of the panel which heard oral argument in this case on November 4, 2002, have determined that they are disqualified from deciding the case. Accordingly, reargument in the case has been set for June 16, 2003, before a different panel.

FOR THE COURT
Roseann B. MacKechnie, Clerk

/s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA :

:

-against-

:

NIELS LAUERSEN and
MAGDA BINION, :

Defendants. :

----------X

S2 98 Cr. 1134 (WHP)

ORDER

[Entered: July 27, 2001]

WILLIAM H. PAULEY III, District Judge:

By letter dated July 11, 2001, the Government moved for reconsideration of this Court's decision to recuse itself from any further proceedings in this criminal action based on its holdings of shares of stock in AXA Financial, Inc., formerly the Equitable Insurance Company. (See Transcript of Hearing dated July 10, 2001.) By letter dated July 12, 2001, defendant Binion filed a separate motion for reconsideration, concurring in the Government's legal analysis and requesting severance from defendant Lauersen for

purposes of sentencing. Thereafter, by letter dated July 17, 2001, the Government reported that it was withdrawing any request for restitution on behalf of AXA Financial, Inc., an act intended to remove any obstacle to this Court's ability to continue to preside over this case.

After this Court set a deadline for defendants to submit any response to the Government's July 17 letter, defendant Binion advised that she consented to the Government's withdrawal of its request for restitution on behalf of AXA Financial, Inc. (See Letter from Thomas R. Hession, Esq. Dated July 25, 2001.) By letter dated July 26, 2001, defendant Lauersen opposed the Government's application.

As a result of the Government's decision to forbear from seeking restitution on behalf of AXA Financial, Inc., this Court has determined that recusal is not required provided certain conditions are fulfilled. This Court reaches this decision based entirely on the changed circumstances reflected in the Government's July 17, 2001 letter and independent of any argument previously advanced by the Government. See Committee on Codes of Conduct, Compendium § 3.1-6[7] (a) (2001) ("If the sentencing judge owns stock or has any financial interest in a corporation which would be entitled to restitution from the defendant, the judge must recuse.").

Accordingly, this Court grants the Government's motion for reconsideration based on its decision not to seek restitution on behalf of AXA Financial, Inc. (Equitable), provided that the following

conditions are met: (i) the Government files with the Clerk of the Court an affidavit from an authorized representative of AXA Financial, Inc. that the company waives and releases its claim to the $13,046 in restitution set forth in the presentence investigation reports prepared for defendants Lauersen and Binion; and (ii) the Probation Department issues amended presentence reports as to defendants Lauersen and Binion reflecting that Equitable (AXA Financial, Inc.) is not eligible for restitution as part of sentencing in this case.

In anticipation that those conditions can be met on a timely basis, counsel are directed to appear for a conference on August 7, 2001 at 11:30 a.m. to fix a sentencing date for defendants Lauersen and Binion.

Dated: July 27, 2001
New York, New York

SO ORDERED:

/s/ William H. Pauley III
WILLIAM H. PAULEY III
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

:

-against-

:

NIELS LAUERSEN and
MAGDA BINION, :

Defendants. :

----------x

S2 98 Cr. 1134 (WHP)

ORDER

[Entered: June 6, 2001]

WILLIAM H. PAULEY III, District Judge:

After reviewing the Presentence Investigation Report prepared in connection with the sentencing of defendant Niels Lauersen, this Court determined that it owns a financial interest in at least one of the entities that is eligible for restitution. These circumstances suggest that, as a matter of prudence, this Court may be required to disqualify itself from presiding over any further proceedings in this action. See 28 U.S.C. § 455(a); Canon 3C(1) of the Code of Conduct for United States Judges; United States v. Rogers, 119 F.3d 1377 (9th Cir. 1997); United States v. Feldman, 983 F.2d 144 (9th cir. 1992); United States v. Nobel. 696 F.2d 231 (3d Cir. 1982).

Because any disqualification of this Court is likely based on Section 445(a) of Title 28, not Section 445(b), this Court may continue to participate in the proceedings if all the parties and attorneys, after notice of the basis for the disqualification, agree in writing to waive the disqualification under a procedure independent of this Court's participation. See 28 U.S.C. § 455(e); Code of Conduct for United States Judges, Canon 3D; Hardy v. United States, 878 F.2d 94, 98 n.5 (2d Cir. 1989).

The parties and their counsel are directed to appear on Tuesday, June 12, 2001 at 11:00 a.m. in Courtroom 905 to permit this Court to disclose on the record the basis for the disqualification and to discuss how the parties wish to proceed.

Dated: June 6, 2001
New York, New York

SO ORDERED:
/s/ William H. Pauley III
William H. Pauley III
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES
COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 31st day of December two thousand three.

USA

v. **Dkt No: 01-1526(L)**

Lauersen

[Entered: December 31, 2003]

A petition for panel rehearing and petition for rehearing en banc having been filed herein by the appellant Niels Lauersen, and the panel that heard the appeal having denied said petition for panel rehearing in an order filed on November 24, 2003.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that

heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 24th day of November, two thousand three.

PRESENT: HONORABLE JON O. NEWMAN,
HONORABLE RALPH K. WINTER,
HONORABLE BARRINGTON D. PARKER, JR.
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

v. 01-1526(L), -1600

NIELS LAUERSEN,
Defendant-Appellant-Cross-Appellee.

UNITED STATES OF AMERICA,
Appellee,

v. 02-1338

JAMES RINALDO JACKSON,
Defendant-Appellant.

[Entered: November 24, 2003]

ORDER

Upon consideration of Appellant Lauersen's petition for panel rehearing in No. 01-1526(L), and the Government's petitions for panel rehearing in No. 01-1526(L) and No. 02-1338, it is hereby Ordered:

1. The slip opinion in No. 01-1526(L) is amended in the following two respects (in addition to amendments previously made be an errata sheet filed October 31, 2003):

(a) On slip opinion page 5726, footnote 11, second full paragraph, the third and fourth sentences ("Neither Equitable . . . 616 entries") are deleted and replaced with the following:

> Neither Equitable nor AXA was mentioned in the indictment or in any testimony at the first trial; Equitable was mentioned in two consecutive questions asked by defense counsel during cross-examination of the case agent at the second trial. The questioning concerned $4,900 billed to Equitable for a culdoscopy procedure. Not surprisingly, these fleeting references did not alert Judge Pauley to the possibility of a basis for recusal because of his ownership of AXA shares. Apart from the PSR, the only other reference to Equitable was in Exhibit GX 500, in which Equitable was mentioned twice among 616 entries.

(b) On slip opinion page 5726, footnote 11, at the end of the second full paragraph, insert the following:

> In this respect, this case significantly differs from Chase Manhattan Bank v. Affiliated FM Insurance Co., 343 F.3d 120 (2d Cir. 2003), in which we ruled that a reasonable person would consider a trial judge to have known that a plaintiff bank had merged with a bank in which the judge owned shares. Among the pertinent circumstances was the identification of the bank under its old and new name in the judge's findings of fact. See id. At 130.

2. In all other respects, the Appellant's petition for panel rehearing in No. 01-1526(L) is denied.

3. With respect to the Government's petitions for panel rehearing in No. 01-1526(L) and No. 02-1338, the issue of the availability of the departure from the applicable Sentencing Guidelines range permitted by the panel opinion will be subject to briefing and oral argument under the following schedule:

(a) The Government shall file briefs (or a composite brief, if it prefers) by December 12, 2003.

(b) The Appellants Lauersen and Jackson shall file briefs (or a composite brief, if they prefer) by January 2, 2004.

(c) Oral argument will be held in the United States Courthouse at New Haven, CT. as early as the week of January 5, 2004, on a date to be set by the Clerk.

The briefs shall not exceed 25 pages and may be submitted in letter form.

FOR THE COURT,
ROSEANN B. MacKECHNIE, Clerk

By /s/ Lucille Carr

UNITED STATES DISTRICT COURT
Southern District of New York

UNITED STATES OF AMERICA

v.

NIELS LAUERSEN

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

[Entered: October 17, 2001]

Case Number: 1: S2 98 CR 01134-01 (WHP)

Date of Original Judgment: 10/15/2001
(Or Date of Last Amended Judgment)

Gerald L. Shargel, Esq.
Defendant's Attorney

Reason for Amendment:
x Correction of Sentence for Clerical Mistake (Fed. R. Crim. P.

THE DEFENDANT:
xx was found guilty on count(s) 1,2,3 - 10, 16-19, 20, 21 after a plea of not guilty.

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
18 USC 371	Conspiracy to Commit Mail Fraud, Health Care Fraud and False Statements	09/30/1997	1
18 USC 1347 and 2	Health Care Fraud	09/30/1997	2
18 USC 1341 and 2	Mail Fraud	01/28/1997	3 - 10
18 USC 1035(a) and 2	False Statements Relating to Health Care Matters	05/07/1997	16 - 19

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, cost, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. 127-42-9141

Defendant's Date of 09/10/1936

Defendant's USM No.: 45461-054

Defendant's Residence Address:
750 Park Avenue
Apt. 14A
New York, New York 10021

Defendant's Mailing Address:
same as above

10/15/2001
Date of Imposition of Judgment

/s/ William H. Pauley III
Signature of Judicial Officer

William H. Pauley III, United States District Judge
Name and Title of Judicial Officer

10/17/01
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	**Nature of Offense**
18 USC 1512(b)	Witness Tampering

Date Offense Concluded	**Count Number(s)**
08/07/1998	20 - 21

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 87 months.

(The sentences on Counts 1, 3 - 10 and 16 - 19, each carrying a statutory maximum of five years, is sixty (60) months and the sentences on Counts 2, 20 and 21, each carrying a statutory maximum of ten years, is 87 months. The sentences on Counts 1, 3 -10 and 16 -19 shall run concurrently each other and sentences on Counts 2, 20 and 21 shall run concurrently with each other; twenty-seven (27) months of the sentences on Counts 2, 20 and 21 shall run consecutively to the sentences on Counts 1, 3 -10 and 16 - 19, with the remaining sixty (60) months on the sentences of Count 2, 20 & 21 to run concurrently).

xx The court makes the following recommendations to the Bureau of Prisons:

1. The defendant be incarcerated in the Northeast region.

2. The defendant be incarcerated in a low security facility.

xx The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

xx The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of

Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer with access to any requested financial information.

2. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

3. The defendant shall report to the nearest Probation Office within 72 hours of release from custody.

4. The defendant shall be supervised by the district of residence.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$1,600.00	$17,500.00	$3,240,597.00

RESTITUTION

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below

Name of Payee	**Total Amount of Loss
32 BJ Benefit Fund (Local Union)	
1099 National Benefit Fund for Hospital and Health Care Employees	
1199 Home Care Industry Benefit Fund	
Aetna US Healthcare (Prudential Healthcare)	
Totals:	

Amount of Restitution Ordered	Priority Order or Percentage of Payment
$3,497.00	
$9,016.00	
$18,474.00	
$449,332.00	
$ 3,240,597.00	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 1994 but before April 23, 1996.

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

1. The restitution shall be paid in full immediately. The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

2. If the defendant is engaged in a BOP non-UNICOR work program, the defendant shall pay $25 per quarter toward the criminal financial penalties.

However, if the defendant participates in the BOP's UNICOR program as a grade 1 through 4, the defendant shall pay 50% of his monthly UNICOR earnings toward the criminal financial penalties, consistent with BOP regulations at 28 C.F.R. § 545.11. Any payment made that is not payment in full shall be divided proportionately among the persons named.

ADDITIONAL RESTITUTION PAYEES

Name of Payee	**Total Amount of Loss
Adjustco Inc.	
Alta Health Strategies Inc.	
American International Companies	
American Medical and Life	
Anthem Blue Cross Blue Shield of Maine	
AT&T	
Blue Cross Blue Shield Connecticut	
Blue Cross Blue Shield Rhode Island	
POMCO (bedord-Carmel Schools Health Plan)	
Bergen County Carpenter's Fund	
(Cablevision Health Plan)	
Chubb LifeAmerica	
Cigna Healthcare (Equicor)	
Claims Development Corporation	
Claims Development Corporation	
(Kaye, Scholer, Fierman, Hays & Handler)	
Connecticut General Insurance Company	
Continental Assurance Company (CNA)	
Corporate Health Administrators	
EBA	
Empire Healthchoice	
(formerly Empire Blue Cross Blue Shield)	

ADDITIONAL RESTITUTION PAYEES

Name of Payee	**Total Amount of Loss
Greatwest Life Insurance Company	
Group Health Incorporated (Comprehensive Benefits)	
Guardian Life Insurance Company	
Hartford Insurance Company	
Health and Benefit Trust Fund of the Engineers Union, Local 94-94A	
HIP	
Home Life Insurance Company	
Horizon Blue Cross Blue Shield of New Jersey	
Hospitalization, Surgical & Major Medical of the Joint Industry Board (JIB) of the Electric Industry	
John Hancock Life Insurance Company	
Johnson & Higgins	
Local 2000 Benefit Fund	
Local 295/851 Benefit Fund Employer Group Welfare Fund	
Local 812, IBT, AFL-CIO, Vista Plan Administrators	
Local 88 Health Fund	
Magna Card - Pro Choice	
Mail Handlers Benefit Plan	
Massachusetts Mutual Life Insurance Company	
Mennonite Mutual Life Insurance Company	
Metropolitan Life Insurance Company	
Metra Health	
Metropolitan Insurance	
Mutual of Omaha	
National Casualty Company	
NWNL Health Management Corporation	
New York District Counsel of Carpenters Welfare Fund	
New York Life Insurance Company	

ADDITIONAL RESTITUTION PAYEES

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Nippon Life Insurance Company of America		$17,544.00	
NJADA Group Insurance Trust Fund		$11,744.00	
North American Administrators, Inc. (GNY Automobile Dealers Health and Welfare Trust)		$7,613.00	
Oxford Insurance Company		$35,544.00	
Phoenix Mutual Life Insurance Company		$4,744.00	
Principal Mutual Life Insurance Company			
Provident Insurance Company			
Qualcare			
Sanus Plus			
Service Employees Welfare Fund, Local 32E, AFL-CIO			
Special Agents Mutual Benefit Association, Inc. (Samba)			
Teamsters Allied Benefits Funds			
The Travelers Insurance Company			
TR Paul Group Services			
Ullico			
Unicare Life & Health Insurance Company			
United Federation of Teachers Health Care Benefit Fund			
United Medical Resources			
U.S. Life Insurance Company			

ADDITIONAL RESTITUTION PAYEES

Amount of Restitution Ordered	Priority Order or Percentage of Payment
$6,822.00	
$2,850.00	
$3,366.00	
$5,476.00	
$7,522.00	
$5,281.00	
$82,639.00	
$227,052.00	
$13,072.00	
$5,122.00	
$15,984.00	
$11,476.00	
$5,067.00	
$6,569.00	
$653,576.00	
$15,279.00	
$275,770.00	
$212,957.00	
$6,191.00	
$16,997.00	
$10,400.00	
$15,724.00	
$69,822.00	
$17,088.00	
$63,736.00	
$4,622.00	
$4,683.00	
$21,351.00	
$11,369.00	

ADDITIONAL RESTITUTION PAYEES

Amount of Restitution Ordered	Priority Order or Percentage of Payment
$3,970.00	
$7,017.00	
$23,934.00	
$40,932.00	
$4,122.00	
$90,048.00	
$21,473.00	
$44,691.00	
$22,606.00	
$9,069.00	
$16,021.00	
$3,315.00	
$34,184.00	
$20,169.00	
$21,284.00	
$12,880.00	
$186,285.00	
$20,837.00	
$43,365.00	
$1,122.00	
$9,570.00	
$2,785.00	
$1,926.00	
$3,354.00	
$8,600.00	
$161,940.00	
$26,079.00	
$12,075.00	
$6,207.00	

ADDITIONAL RESTITUTION PAYEES

Amount of Restitution Ordered	Priority Order or Percentage of Payment
$7,762.00	
$5,122.00	
$12,482.00	

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A x In full immediately; or

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

1. The restitution shall be paid in full immediately. The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

2. If the defendant is engaged in a BOP non-UNICOR work program, the defendant shall pay $25 per quarter toward the criminal financial penalties. However, if the defendant participates in the BOP's UNICOR program as a grade 1 through 4, the defendant shall pay 50% of his monthly UNICOR earnings toward the criminal financial penalties, consistent with BOP regulations at 28 C.F.R. § 545.11. Any payment made that is not payment in full shall be divided proportionately among the persons named.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

NOTICE OF APPEAL
UNITED STATES DISTRICT COURT
SOUTHERN District of NEW YORK

UNITED STATES OF AMERICA,
Plaintiff

v.

NIELS LAUERSEN,
Defendant

Docket Number S2 98-CR-1134

Hon. WILLIAM H. PAULEY
(District Court Judge)

[Filed: October 16, 2001]

Notice is hereby given that Niels Lauersen appeals to the United States Court of Appeals for the Second Circuit from the judgment x ; conviction and sentence entered in this action on October 15, 2001.

Offense occurred after November 1, 1987 Yes x

The appeal concerns conviction and sentence. x

Date OCTOBER 16, 2001
TO: Christine Chung, AUSA
ONE ST. ANDREWS PLAZA
NY, NY 10017

Nathan Z. Dershowitz
(Counsel for Appellant)
Address DERSHOWITZ, EIGER ADELSON, PC
350 FIFTH AVENUE, SUITE 7912
NEW YORK, NY 10118
Telephone Number (212) 967-0667

(TO BE COMPLETED BY ATTORNEY)
QUESTIONNAIRE

x I am not ordering a transcript

TRANSCRIPT INFORMATION – FORM B
TRANSCRIPT ORDER
DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATE).

Dates
Prepare transcript of
x Sentence October 15, 2001

The ATTORNEY certifies that he/she will make satisfactory arrangements with the court reporter for payment of the cost of the transcript (FRAP 10(b))
Method of Payment x Funds

ATTORNEY'S Signature /s/ DATE 10/16/01

[Dated: October 15, 2001]

THE COURT: Please be seated.

Niels Lauersen comes before this court for sentencing, having been convicted after a trial by jury of one count of conspiring to commit mail fraud, health care fraud and making false statements relating to health care matters, in violation of 18 U.S.C. Section 371; one count of health care fraud, in violation of 18 U.S.C. Section 1347; eight counts of mail fraud, in violation of 18 U.S.C. Section 1341; four counts of making false statements in relation to health care matters, in violation of 18 U.S.C. Section 1034; and two counts of witness tampering, in violation of 18 U.S.C. Section 1512 (b).

This court has reviewed the presentence investigation report prepared by the Probation Department, dated August 29th, 2001, and except as specifically noted in my remarks to come, this court adopts the findings of the Probation Department as my own.

The Probation Department recommends that the defendant Lauersen be sentenced to 168 months, followed by a two-year term of supervised release. Specifically, the Probation Department calculated the guideline range as follows:

A base level of 6, pursuant to Section 2F1.1;

A 13-level upward adjustment pursuant to Section 2F1.1(b) (1) (N), based on an intended loss estimate of $4,490,778;

A 2-level upward adjustment pursuant to Section 2F1.1(b) (2) (B) because the fraud and false statement offenses involved more than minimal planning;

A 4-level upward adjustment pursuant to Section 2F1.1(b) (8) (B) because the fraud and false statement offenses affected "financial institutions" and because Dr. Lauersen derived more than $1 million in gross receipts from those offenses;

And a 4-level upward adjustment pursuant to Section 3B1.1(a) because Dr. Lauersen was a leader and organizer of the criminal activity which involved more than five participants;

A 2-level upward adjustment pursuant to Section 3B1.3 because, in executing the offenses, Dr. Lauersen, as a medical doctor, abused his position of trust relative to the defrauded insurance companies; and

Finally, a 2-level upward adjustment pursuant to Section 3C1.1 because Dr. Lauersen was convicted of two counts of obstruction of justice.

The sum of the base offense level and the upward adjustments yields a total offense level of 33. Because this is the defendant Lauersen's first conviction, applicable criminal history category is I.

Using the recommended guidelines calculations, the sentence range is 135 to 168 months. The Probation Department also recommends a fine of $17,500 and restitution in the amount of $3,274,606.

Defendant Lauersen objects to each of the upward adjustments applied by the Probation Department, with the exception of the adjustment applied for more than minimal planning.

In addition, the defendant Lauersen argues that each of the factors that increase his sentence should have been found by a jury at trial beyond a reasonable doubt, not by this Court by a preponderance of the evidence, and that in increasing his sentence based on such factors violates his due process rights. Further, Dr. Lauersen requests that this Court depart downward based on a number of factors.

At the outset, this Court considers defendant Lauersen's argument that the Supreme Court's decision in Apprendi versus New Jersey, 530 U.S. 466 (2000) counsels against invoking any of the special offense characteristics and role-related adjustments not found by a jury beyond a reasonable doubt that mandate an increase in his sentence. Consistent with the prior ruling at trial denying defendant Lauersen's request for jury interrogatories, this Court declines the invitation to so extend the holding in Apprendi, a path that has been foreclosed by recent Second Circuit decisions.

In Apprendi, the Supreme Court held that, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 490. The Supreme Court made clear, however, that its holding applies only to a sentencing enhancement that increases a defendant's sentence, "beyond the maximum authorized statutory sentence," because it then becomes, "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." Apprendi, 530 U.S. at 494 n.19.

Apprendi does not apply to a sentencing factor that "supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense." 530 U.S. at 494 n.19.

Recent Second Circuit authority binding on this Court confirms that Apprendi does not apply unless the increase will result in a sentence higher than the statutory maximum sentence for the offense. In United States versus White, 240 F.3d 127, 136 (2d Cir. 2001) the Second Circuit held, and I quote:

"Where, as here, factual determinations were used to sentence the defendant to a sentence within the maximum allowed by statute, Apprendi is not controlling, and such determinations can be made by the court without violating the defendant's right to due process. As for the standard of proof that must be used..., a preponderance of the evidence is the appropriate standard to be used in considering uncharged relevant conduct for sentencing purposes.

See also United States versus Greene, 240 F.3d 180, 184 (2d Cir. 2001).

Consequently, Apprendi does not bar this Court from applying any of the factors that increase defendant Lauersen's sentence. Notably, a sentence that results from the adoption of all the recommended upward adjustments, one with a guidelines range of 135 to 168 months, will exceed the statutory maximum of any single count of conviction.

Nonetheless, the Second Circuit specifically has held that Apprendi does not bar the ordering of consecutive sentences pursuant to Section 5G1.2(d) of the sentencing guidelines, commonly known as "stacking" the sentence on each of the multiple counts, to reach the total punishment imposed by the guidelines range. White, 240 F.3d at 135; accord United States versus McLeod, 251 F.3d 78 at 83-84 (2d Cir. 2001); and United States versus Moreno, No. S3 94 Cr. 1065 (SS), 2000 WL 1843232, at *6-10 (S.D.N.Y. December 14, 2000).

This court recognizes that defendant Lauersen's argument to extend Apprendi to sentencing factors within the statutory maximum has a certain logical appeal. However, the Second Circuit expressly has declined to so extend the holding of Apprendi, "on the basis of the alarms sounded by the dissenters" until otherwise instructed by the Supreme Court. See Garcia 240 F.3d at 183-84. As such, the defendant Lauersen's objection based on Apprendi is overruled.

Now I turn to the factors increasing the sentence above the base offense level of 6, first turning to the computation of the amount of loss under Section 2F1.1. In fraud cases, the sentencing guidelines require an increase in offense level based on the amount of actual or intended loss to the victim. See U.S.S.G. Section 2F1.1(b) (1) (2000). If a loss owing to fraud exceeds $2,500,000 and is less than $5 million, as the Probation Department determined here, the guidelines provide for a 13-level increase, to the six point offense level prescribed for fraud offenses. "The loss need not be determined with precision," and the sentencing court, "need only make a reasonable estimate of the loss given the available information." U.S.S.G. Section 2F1.1, cmt.n.9, (2000); United States versus Jacobs, 117 F.3d 82, 95 (2d Cir. 1997).

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

August 7, 2001

VIA HAND DELIVERY

Honorable William H. Pauley
United States District Judge
Southern District of New York
40 Centre Street, Rm. 234
New York, New York, 10007

Re: United States v. Lauersen & Binion
S2 98 Cr. 1134 (WHP)

[Filed: August 7, 2001]

Dear Judge Pauley:

As discussed at the hearing this morning, enclosed herewith is a copy of the affidavit executed by Mr. Dave Hattem, Senior Vice President and Associate General Counsel, AXA Financial, Inc., waiving and releasing any claim that AXA may have to the $13,046 in restitution recommended by the Probation Office. A copy of this affidavit was filed today with the Clerk of

Court, and forwarded to the Probation Office. The original will be filed as soon as it is received from Mr. Hattem.

Respectfully submitted,

MARY JO WHITE
United States Attorney
Southern District of New York

By: /s/ Christine H. Chung/James G. Cavoli
Christine H. Chung/James G. Cavoli
Assistant United States Attorney
(212) 637-2271/2485

attachment

cc: Gerald Shargel, Esq.
Thomas Hession, Esq.
USPO David Sternberg
(Via facsimile)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA :

:

-v- :

NIELS LAUERSEN, et al. :

Defendants. :

----------X

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

S2 98 Cr. 1134 (WHP)

AFFIRMATION

[Dated: August 6, 2001]

DAVID HATTEM, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am a Senior Vice-President and Associate General Counsel at AXA Financial, Inc.

2. I have been informed by representatives of the United States Attorney's Office in the Southern District of New York that the United States Probation

Office ("Probation Office"), in preparing the presentence reports for Niels Lauersen and Magda Binion in this proceeding, has determined that AXA Financial Inc. may be eligible for restitution in the amount of $13,046 from either defendant.

3. AXA Financial Inc. hereby waives and releases any claim to the restitution recommended by the Probation Office. AXA Financial Inc. understands that as a result of this waiver, the Court will not award any amount of restitution to be paid to AXA Financial as part of the sentencings of Niels Laurensen or Magda Binion.

I declare under penalties of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. § 1746.

Dated: New York, New York
August 6, 2001

/s/ David Hattem
DAVID HATTEM, Esq.

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

July 27, 2001

VIA HAND DELIVERY

Honorable William H. Pauley III
United States District Judge
Southern District of New York
40 Centre Street, Rm. 234
New York, New York, 10007

Re: United States v. Lauersen et al.
S1 98 Cr. 1134 (WHP)

[Filed: July 27, 2001]

Dear Judge Pauley:

The Government respectfully submits this letter in response to defendant Lauersen's letter of yesterday.

Lauersen tellingly does not even attempt to impugn the Government's argument that the entire "waiver" process was mistakenly undertaken before a determination, at the threshold, of whether the Court's partiality might reasonably be questioned by an

objective observer. Rather, he now claims that he has suffered prejudice warranting recusal because he has lost his anonymity in seeking the Court's recusal.

As the Government stated in its letter of July 11, this contention is meritless because Lauersen was never entitled to anonymity in seeking the Court's recusal in the first place, given that there had never been a determination that your Honor's infinitesimally small interest in AXA Financial would, when evaluated on an objective basis, lead a reasonable observer to believe that the Court's impartiality had been compromised. Lauersen's citation of Matter of Nat'l Union Fire Insur. Co., 839 F.2d 1226 (7th Cir. 1988), as if it somehow aids his argument, is utterly mysterious. The case, which involved a potential interest that the district judge had vis-à-vis one of the parties in his case, first makes clear the precise point of the Government's July 11 letter. It states:

> [R]emittal of disqualification, as provided by Canon 3D, is available only where a judge has already determined that under the circumstances the judge's impartiality might reasonably be questioned.

Id. at 1228 (quoting Reply of Advisory Committee on Codes of Conduct of the Judicial Conference to district judge's query). In the case Lauersen cites, Judge Shadur of the District Court of the Northern District of Illinois had requested input from the parties about whether he should disqualify himself before determining whether the alleged conflict led to a circumstance where his impartiality might reasonably

be questioned. The District Judge ultimately found that the conflict did not require recusal but, in the meantime, because the Court had sought comment, the identity of the entities seeking the Court's recusal had become known. These entities argued on appeal (in a claim analogous to Lauersen's objection here) that because they had been exposed, recusal was required regardless of whether the impartiality of the judge might reasonably be questioned.

While the panel of the Seventh Circuit frowned on the practice of a court seeking comment from the parties in advance of a determination from the Court itself of whether the alleged conflict required recusal, the panel expressly stated, "we do not agree" with the notion, expressed by the Advisory Committee on Codes of Conduct, that "a judge who solicits advice from counsel must stand aside if counsel objects, even though judicial service does not present an appearance of impropriety." Id. at 1230-31. The panel noted that the entities who had disclosed their objection to the judge by taking up the judge's invitation to comment were no worse off than any party who unsuccessfully moved for recusal, thus "necessarily identify[ying] himself." Id. at 1231. The Seventh Circuit thus affirmed Judge Shadur's decision to continue serving on the case, notwithstanding the complaint of the objecting parties that they had, in effect, shown their hand. Id.

Matter of Nat'l Fire Union, thus, supports the Government's motion for reconsideration.

Nor is it credible for Lauersen to imply that he was unfairly surprised by the events as they unfolded. Even assuming for argument's sake that Lauersen and his counsel were unaware of the state of the law that the Government laid out in its July 11 letter, what Lauersen neglects to address is that he, no less than the Court or the other parties, could through diligence have found that same law. Nor was he prejudiced by the Court's proposal of the waiver process or the alleged failure of the Government to object. In fact, as Lauersen repeatedly ignores, the Government did not fail to object; indeed, it could not have been clearer in putting Lauersen on notice that the Court, in proposing the waiver procedure, was possibly wrongly inverting the steps in the recusal process:

> AUSA Chung: I do think, or I would at least like to preserve the possibility of arguing, and maybe this just doesn't come into play at all because everybody waives, but I do - I may have a disagreement with the court's view...that disqualification would be automatic in the event that there wasn't a waiver from any party and I guess the reason I raise that is that I would like to be sure that we can be heard on that if it becomes necessary.

> I don't want to show up on the 10th and find out that you have disqualified yourself, your Honor, and if there is some way we can have an insurance [sic] that we are going to be here on the 10th with your Honor still on the case one way or the other so that we can discuss where to go from there.

June 12, 2001 Tr. at 10-11 (emphasis supplied).[1] This statement provided ample warning to Lauersen that the Government – on or after July 10 - - might well disagree that his silent veto, in and of itself, would be sufficient to disqualify your Honor. To the extent that Lauersen's expectations were disrupted, then, this disruption was attributable in no small part to Lauersen's own failure to take heed of the Government's warning. Of course, in the end, as the Seventh Circuit held in Matter of Nat'l Fire Union, even the disclosure of Lauersen's identity as the objecting party, in these circumstances, does not militate in favor of recusal.

Lauersen's remaining requests are equally baseless. The suggestion that the jury verdict be revisited is entirely frivolous. First, your Honor made it entirely clear, in the portion of the transcript of June 12 which Lauersen cites, that until reviewing the PSR, the Court was wholly unaware of the two claims (of more than six hundred that the Probation Dept. later

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[1] This excerpt establishes that it was in fact the Government's expectation that the Court disturbed by recusing itself on July 10.

relied upon in recommending restitution) as to which Equitable was the victim. Thus notwithstanding that Equitable may have appeared twice on GX 500, your Honor has already stated that the Court had no knowledge during the trial that would have led to even a potential conflict. More fundamentally, the interest is, as Lauersen apparently concedes, so minute and attenuated that in no event did it create an appearance of impropriety, objectively viewed. As a makeweight, Lauersen drags in references to claims involving Aetna and AT & T. Again, there is no attempt to demonstrate how the Court's interest in these entities is anything but remote and insubstantial - thus rendering any potential for even the appearance of impropriety, for all practical purposes, "nonexistent." See United States v. Ravich, 421 F.2d 1196, 1205 (2d Cir. 1970) (Friendly, J.); United States v. Sellers, 566 F.2d 884 (4th Cir. 1977).

Finally, Lauersen renews his request for bail pending sentence. With respect to this request Lauersen, though urging the Court to recuse itself, inconsistently requests that your Honor entertain and grant his renewed bail application. Also, in suggesting that the Court reverse its bail ruling (apparently, in Lauersen's view, as a "last act" before transfer of the case), Lauersen executes an about-face from the position he took at the last conference, frankly acknowledging that transferring the case will undoubtedly occasion greater delay than having your Honor see out the resolution of the case. Lauersen is entirely correct that transfer of the three-year old case will be far more disruptive - to him and the Court - than concluding the final stage of the case before your Honor. Lauersen is wrong, however, to believe that

bail is warranted until he is sentenced. None of the factors relating to Lauersen's risk of flight has been altered and, as such, continued detention is obviously appropriate. In addition, Lauersen has been incarcerated for approximately 4 months and, absent a departure, faces a sentence - 135 to 168 months - far in excess of any likely pre-sentence period of incarceration. Notably, Lauersen himself requested over two months to object to the PSR and file sentencing motions with the Court. There thus is no prejudice to Lauersen in continuing his pre-sentencing detention. In the Government's view, the appropriate means of speeding resolution of the case is, instead, for the Court to decline to recuse itself and set an expeditious schedule for proceeding to sentence.

Respectfully,

MARY JO WHITE
United States Attorney

By: /s/ Christine H. Chung
CHRISTINE H. CHUNG
JAMES G. CAVOLI
Assistant United States Attorney
(212) 637-2271, 637-2485

cc: Gerald Shargel, Esq.
Thomas Hession, Esq.

GERALD L. SHARGEL
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570 LEXINGTON AVE., 16TH FLOOR
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July 26, 2001

BY FAX: (212) 805-6390

Hon. William H. Pauley, III
United States District Judge
Southern District of New York
40 Centre Street
New York, New York 10007

Re: United States v. Lauersen, et ano.,
98 Cr. 1134 (WHP)

[Filed: July 26, 2001]

Dear Judge Pauley:

I respectfully write, at the Court's direction, in response to the government's letter of July 17, 2001, submitted in support of the government's motion for reconsideration of the Court's decision to recuse itself from the above-referenced case. In its July 17th letter, the government withdraws any request for restitution

to AXA with AXA's consent. For the following reasons, this concession, at bottom, simply comes too late.

By order dated June 6, 2001, the Court first informed the parties that "it owns financial interest in at least one of the entities that is eligible for restitution" that may require the Court "as a matter of prudence...to disqualify itself from presiding over any further proceedings in this action" pursuant to 28 U.S.C. § 455(a). See Court's Amended Order dated June 6, 2001. Your Honor then held a hearing on June 12, 2001, in which you informed the parties that you, along with your wife, own shares of stock in AXA Financial, Inc. (previously Equitable Insurance Company), which "constitute a financial interest that requires disqualification pursuant to 28 U.S.C. § 455(a) in order to avoid any appearance of impropriety." See Transcript dated June 12, 2001, at 4-5.

Following certain additional disclosures regarding other interests in entities eligible for restitution, discussed infra, the Court then alerted the parties to the procedure that would be instituted to effectively deal with this issue. Specifically, Your Honor declared your intention to disqualify yourself from this case unless all parties submitted a form waiving the disqualification by a certain date. See id. at 6. A notice and a waiver form, the Court informed, were to be sent to all parties by the Clerk of the Court and, if waiver was not received from all parties, the notice from the Clerk and all responses were to be kept under seal by the clerk and not shown to the judge. See id. at 6-7. Additionally, the Court stated at the June

12th proceeding, the judge was not to be informed of the identity of any party or lawyer who declined to waive the disqualification. See id. at 7. It was clear, of course, that this method was employed to ensure anonymity.

Although the parties requested that another conference be scheduled before the Court after the time for waiver had passed, no party objected to this procedure as explained by the Court. Shortly thereafter, notices and waiver forms were in fact sent to the parties detailing with clarity the procedure and affording the parties two weeks to make their respective decisions. Again, no party objected to the procedure.

On July 10, 2001, long after the notices had been distributed and the time for submitting the waiver forms had run, the government for the first time objected to the Court's disqualification based on its financial interest in entities eligible for restitution, as disclosed by the Court. Counsel for Binion, also have failed previously to object, joined in the government's objection to the Court's disqualification. It was made clear then, despite all the cautionary measures taken to ensure anonymity with regard to the waiver process, that it was Dr. Lauersen who failed to waive. Thus, the Court's post-waiver-process reversal of its decision to disqualify itself would unquestionably compound the appearance of impropriety. In light of this - and the fact that Dr. Lauersen continues to languish at the MCC without a sentencing date, discussed infra - the Court affirmed its recusal decision, concluding: "I think that the best course is for the matter to be swiftly

reassigned to another judge and I will take the appropriate steps tomorrow morning to start that process." See Transcript dated July 10, 2001, at 26.

Notwithstanding the government's repeated requests, the Court denied the government permission to brief the matter further, stating: "I am convinced that what the code of conduct had in mind with respect to [anony]mity is well worth preserving and that nothing productive can be accomplished by a further discussion or further briefing on the issue. In fact, I'm convinced that further briefing or discussion on the issue would merely spawn more litigation in this mater...." See id. at 26. The Court also declined to allow the government time to discuss with supervising government officials whether to withdraw any request for restitution to AXA, admonishing the government that "that should have been thought about and done, and I think that the way in which this argument progressed today was really not in the best interests of the order that I envisioned or the notice that all of you received, which made it clear that among all things [anony]mity was to be preserved...." See id. at 25.

Despite the Court's unequivocal ruling on the issue, the government nevertheless submitted a letter-brief the following day, July 11, moving for reconsideration of the Court's decision to recuse itself. On July 12, Binion's attorney also wrote to the Court pleading for reconsideration of the Court's decision, at least with regard to defendant Binion. The government then submitted the July 17th letter stating that it would withdraw any request for restitution to AXA if the Court would reverse its decision to recuse itself. These

letters served only to aggravate the problem by making it unmistakably clear – if it were not already so – that it was Lauersen who did not waive disqualification. Avoiding any greater appearance of impropriety is precisely the reason that the Court implemented the procedure that it did. In fact, on this score, the Seventh Circuit Court of Appeals, in a case involving a disqualifying interest under § 455(a), expressed its view that, for this very reason, "[j]udges should refrain from asking for the views of counsel of these questions." Matter of National Union Fire Insurance Company, 839 F.2d 1226, 1231 (7th Cir. 1988) (emphasis added).

> In all cases involving actual, potential, probable or *possible* conflicts of interests, a federal judge should reach his own determination as to whether he should recuse himself from a particular case, *without calling upon counsel* to express their views as to the desirability of his remaining in the case. The too frequent practice of advising counsel of a possible conflict, and asking counsel to indicate their approval of a judge's remaining in a particular case is fraught with potential coercive elements which make this practice undesirable.

Id., citing Resolution L, Judicial Conference of the United States, October, 1971) (emphasis in original). See also Hoekema, Susan B., Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a), Temple Law

Quarterly, Fall, 1987, at 12-13 ("Under section 455, judges have more latitude in reaching the decision whether to disqualify themselves...Giving the challenged judge this role in the disqualification process has the advantage of allowing the judge with the best knowledge of the issue to resolve it speedily. But when the judge denies disqualification, questions regarding the judge's impartiality are compounded rather than settled. Moreover, the appearance of impartiality is not advanced when a challenged judge proceeds to try a case and there has been no outside assessment of the challenge to that judge's impartiality.").

Thus, in light of the Court's determination that it should disqualify itself absent a waiver from the parties, together with the events occurring subsequent to the Court's disclosure of its disqualifying interest, the government's 13th hour concession to withdraw any request for restitution to AXA should have no impact on the Court's prior decision.

Further, although the Court stated at the June 12th appearance that it was unaware, prior to receiving the presentence investigation report, that Equitable Insurance Company was one of the alleged victims of the fraud because "Equitable was never mentioned in either of the indictments returned in this case or during either of the two lengthy trials" (see June 12th transcript at 3), Equitable did in fact appear twice on GX 500 - the government's purported fraud chart - as the insurer. Moreover, while they may not be disqualifying interest, the parties only learned for the first time after the trial was completed that the Court held financial

interest in Aetna - formerly Prudential - and AT&T, two other alleged fraud victims. These facts raise additional questions of impartiality and weigh prominently in favor of the Court's determination from the outset that it should disqualify itself absent a waiver from all parties. Therefore, pursuant to the principles articulated in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860 (1988), wherein the Supreme Court held that vacatur of a conviction is required where "an appearance of partiality is created even though no actual partiality exists," we respectfully move to set aside the verdict. We will fully brief this motion before this Court if it decides to retain jurisdiction or before another judge if the matter is reassigned.

Finally, if this Court retains jurisdiction over the case - whether it be for the short or long term, we respectfully ask the Court to reconsider the previously made application for bail pending sentence pursuant to 18 U.S.C. § 3143(a), As the Court is well aware, Dr. Lauersen has been languishing at the MCC since March of this year awaiting sentence. Although the sentencing was scheduled to go forward on June 22, and timely submissions were made by counsel for Lauersen in anticipation of that sentencing date, this development has caused - and will probably continue to cause - a lengthy delay, as a new judge will need to familiarize himself with this highly complex case and hearings will likely be necessary. Thus, we once again respectfully request that the Court grant Dr. Lauersen bail pending sentence, imposing whatever conditions it deems appropriate to ensure the defendant's continued presence in this jurisdiction.

Respectfully yours,
/s/ Sarita Kedia
Sarita Kedia

cc: Christine Chung, Esq.
James Cavoli, Esq.
(By fax)

Thomas Hession, Esq.
(By fax)

U.S. Department of Justice

United States Attorney
Southern District of New York

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July 17, 2001

VIA FACSIMILE

Honorable William H. Pauley
United States District Judge
Southern District of New York
40 Centre Street, Rm. 234
New York, New York, 10007

Re: United States v. Lauersen & Binion
S2 98 Cr. 1134 (WHP)

[Filed: July 17, 2001]

Dear Judge Pauley:

The Government respectfully submits this letter in further support of our motion for reconsideration of your Honor's decision on July 10, 2001 to recuse yourself from the above-referenced case based upon ownership of 400 shares of AXA Financial, Inc. ("AXA"), an entity, which, according to the Presentence Investigation Report ("PSR"), is entitled to $13,046 in restitution. (PSR ¶ 46).

Having discussed the issue of restitution with representatives of AXA, the Government hereby withdraws any request for restitution to AXA. AXS representatives consent to this request, and have informed the Government that they waive any claim to the $13,046 set forth in the PSR.

While it remains the Government's position that no reasonable person could believe that your Honor's very limited ownership interest in AXA creates an appearance of partiality under 28 U.S.C. §455(a) or Canon 3 of the Code of Conduct for United States Judges, the changed factual circumstances noted above should effectively vitiate all possible concerns arising from your Honor's ownership in AXA in their entirety.

Respectfully submitted,

MARY JO WHITE
United States Attorney
Southern District of New York

By: /s/ Christine H. Chung/James G. Cavoli
Christine H. Chung/James G. Cavoli
Assistant United States Attorney
Tel.: (212) 637-2271/2485

cc: Gerald Shargel, Esq.
Thomas Hession, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v.

NIELS LAURENSEN and MAGDA BINION,
Defendant

----------x

98 Cr. 1134 (WHP)

July 10, 2001
5:15 p.m.

[Dated: July 10, 2001]

Before: HON. WILLIAM H. PAULEY, III
District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
CHRISTINE CHUNG
JAMES G. CAVOLI
Assistant United States Attorneys

GERALD SHARGEL
SHARITA KEDIA
Attorneys for Defendant Laurensen

HESSION & BEKOFF
Attorneys for Defendant Binion
BY: THOMAS R. HESSION

(In open court)

THE COURT: Good afternoon. I note the presence of Dr. Lauersen and Dr. Binion at counsel table.

On June 12th, this Court conducted a hearing for the purpose of disclosing its financial interest in entities eligible for restitution as part of any sentence to be imposed on the defendants in this case. At that time this Court described the nature of its financial interest and expressed the view that the shares that my wife and I hold in AXA Financial Inc. as a result of the demutualization of the Equitable Life Insurance Company and the distribution of shares to policy holders constituted a financial interest that requires disqualification pursuant to 28, U.S.C, Section 455(a) in order to avoid any appearance of impropriety.

This Court reiterates that at no time prior to the promulgation of the presentence report on June 1, 2001 did this Court have any knowledge that the Equitable Life Insurance Company was an entity eligible for restitution. Indeed, Equitable was never mentioned in

neither of the indictments returned in this case or during either of the two lengthy trials that this Court conducted.

I reviewed the presentence report on June 5, 2001 and thereafter issued my amended order on June 6th, 2001 setting the matter down for the hearing on June 12th.

At the June 12th hearing, I described the procedure to permit counsel and the parties to waive this judicial disqualification through use of a from approved by the Advisory Committee on the Codes of Conduct for the Judicial Conference of the United States. That procedure contemplated that the Clerk of the Court would prepare and send a notice to all counsel and parties setting forth the basis for disqualification and the procedure to waive the disqualification in a process independent of the judge's participation.

The Clerk of the Court advised my chambers that copies of the notice of waiver of disqualification and the transcript of the June 12th hearing were served by Federal Express on all counsel of record on June 14, 2001 and that return Federal Express mailers were provided with each notice. The time to provide notice of the waiver expired on June 28, 2001.

The Clerk of the Court advised my chambers that the parties did not unanimously waive the disqualification and that the notice and any responses were being filed under seal.

I've looked at the docket sheet and it reflects that on June 29th, 2001 two documents were filed under seal.

At the hearing on June 12th, I agreed not to take any action with respect to this case until the parties had an opportunity to address the Court on July 10th.

Accordingly, the Court is willing to hear any remarks from counsel at this time.

MR. SHARGEL: Judge, may I just say this. I was thinking about today's proceeding and it seems to me that hearing remarks by counsel at this time would defeat the unanimity that's contained in the procedure that was constructed. I don't understand what remarks you're talking about because the parties are getting up and telling what their position is. It seems to me that if the clerk has reported that there is not unanimity and there was not unanimity on waiver, that that's the end of the matter, because your Honor described the procedure when we last appeared in front of you. So I don't think there's anything left to be said.

THE COURT: Well, that was my view as I expressed it at the hearing on June 12th, but at that time it's my recollection that the government requested an opportunity to be heard and I advised everyone on the record and we scheduled this conference for July 10th that I would not take any action until this time.

MR. SHARGEL: You know, Judge, the last time that we appeared in front of you, we were hearing for the first time what procedure was, and I'm quite sure

at that time that we didn't address the procedure, we simply listened to it, and understood what would be happening in the days and weeks ahead.

My concern is that now that I've had the opportunity, and I think that now all counsel have had the opportunity to study the procedure, to understand the procedure and understand the implications of the procedure which are singularly designed, it would seem to me, to ensure unanimity that if the parties start arguing, what was the purpose of the exercise? We're going to defeat the entire purpose of it.

If the point is that you can be dissuaded another way because of the arguments now, I submit that the arguments, if there are arguments to be had, and I didn't know enough about the procedure, I'll be frank to say, that is was difficult hearing it for the first time, we had no advanced notice of what the procedure would be, we heard it for the first time in court, that I'm not sure that everyone apprehended what the implications of the procedure was, because I don't want to be in a position where there is a change of the rule in the middle of the game and we are somehow prejudiced and disadvantaged or any party is prejudiced and disadvantaged by positions taken here in court.

I think your Honor can anticipate and intuit as to what's going to happen here, but my position is that we should go no further, that you construct it -- and I recognize full well that you said you would hear from the government, I may have even said something about being heard myself, and I made that point at that time -

- but it seems to me that we are just going to spin off a slippery slope here and I can fairly anticipate what's going to happen and I don't know where we would go from there, thinking ahead, I don't know where we would go from there.

MS. CHUNG: Well, I have a proposal, your Honor. First of all, I'm a little bit surprised to hear Mr. Shargel say that now he believes, you know, he didn't understand why we're here. He's correct in his recollection that when I requested to be heard on this day we all anticipated that would be the day that your Honor would report the results of the waiver. Mr. Shargel joined my application and asked that nothing be done until this day so that we could both be heard. So I don't think there should be any stripes in here about the fact we're all here. We have now gotten the report of what the result was.

I understand Mr. Shargel's concern. I'm not going to say any more about that. This is not what I was anticipating for reasons that I won't get into with the Court. But what I would propose doing is, without saying more on the record or getting into some other problems that Mr. Shargel is weary of, what I would appreciate and what I would request -- I mean what I would appreciate from Mr. Shargel and request from the Court is an opportunity of -- your Honor, my difficulty is I'm about to leave on vacation, as I think I had told the Court before when we were trying to schedule this matter. If we could have until the Monday, the 28th.

What I would propose doing before that date, your Honor will recall that my concern that I expressed at the last conference, and I'm somewhat more familiar now, the aspect of this that I didn't know very well is the judicial cannons and I realize that those requirements are very strict and I hadn't realized before just how strict they were, but my concern was I wasn't aware at that time and I still am not aware exactly the law in terms of what the recourse is at this point.

So by the 28th what I would propose doing is making a submission to the Court in which we either concur that appropriate disposition is for the matter, I think your Honor's proposal was to put it back in the wheel or some other proposal that we believe is warranted by the law, and if it turns out that there isn't any proposal that's warranted in the law other than putting the case back in the wheel, then obviously we'll concur on that.

MR. SHARGEL: May I?

THE COURT: Yes, you may speak, Mr. Shargel.

MR. SHARGEL: I'm just at a loss to understand how this procedure, as the government -- I want to note that I object to it and I'm at a loss to understand how this procedure works in the manner suggested. If I recall -- and I'm in the middle of a trial, off the record, so forgive me -- but it seems to me that the initial order that brought us before the Court the last time was an order that said that you found appearance of conflict under 455(a) and that unless -- and I hope I'm not

misstating what your Honor's order was -- but unless the parties waive, all the parties waive, there would be recusal. Again, forgive me if I'm misstating what the order was.

So we go from until there's a unanimous waiver to a procedure obviously constructed to ensure unanimity, to now what? Argue it all over again? Then where are the parties left? Do you know what I'm saying?

THE COURT: I have several observations. First, the parties were as free as the Court was to look at the docket sheet and ascertain that two sealed documents were filed on the docket sheet on June 29th, and under the terms of the notice that I informed you on June 12th would go out from the clerk, and I received a copy of that notice, so I have precisely the same notice that each of you received.

The notice specifically set forth that if there was not unanimity with respect to the waiver, then the clerk would file, and I quote from the notice, "if a waiver is not received from all parties and all counsel, this notice and any responses will be kept under seal by the clerk and not shown to Judge Pauley, nor will Judge Pauley be informed of the identity of any party or lawyer who declined to waive the disqualification."

Having seen the two documents were filed under seal, it would be obvious from the notice to any party that there was not unanimity among the parties with respect to waiver, at least as of June 29th, and quite frankly in fixing this date I had given as much of

a cushion as I could to all counsel to consider how they wished to proceed, not knowing whether there would be unanimity among the parties or not. That's first.

Second, I am well aware that Dr. Lauersen continues to be detained at MCC pursuant to an order which I entered, and I recognize that MCC is not a facility that is designed for any long-term stay by a prisoner. I was concerned and I think I expressed this at an earlier hearing about the time that was elapsing with respect to the sentencing, but I accommodate defense counsel in their respective schedules in that regard. I cannot really see any need to prolong this matter by another two and a half weeks.

MS. CHUNG: Your Honor, can I offer -- there's a couple of things, your Honor. I mean one is in response to your Honor's first observation about seeing the docket sheet. I don't want your Honor to think that we were derelict, and now I think we should have looked at the docket sheet -- we didn't. It's not because I wouldn't have looked had there been any question in my mind. It's because Mr. Shargel made me a representation as to what it was going to be and obviously it turned out to be incorrect.

MR. SHARGEL: I object to that comment.

THE COURT: Please. I do not want to get into any of that. I can only tell you what the notice provided specifically with respect to what would happen if there was not unanimity and that something would be docketed under seal, and the clerk acted with

amazing alacrity in following the terms of the notice, and even providing Federal Express mail as to all parties.

MS. CHUNG: Your Honor, on the law -- and we can, if your Honor was to make the deadline this Friday, we would come fly with that deadline -- but on the law my issue here is, and I expressed this at the first hearing, and the reason that I'm not prepared to address it today, I'm not saying this as an accusation as Mr. Shargel, I'm offering it as an explanation as to why I'm not better prepared today, and I apologize for that, your Honor, but there is a reason for that --

MR. SHARGEL: Well, I would not like to be included in her explanation.

MS. CHUNG: It's unfortunately part of the explanation. But 28 U.S.C. 455, which I am familiar with, is not meant to, and there are cases that say this, is not meant as a means for one party or another to unilaterally judge shop. My concern about this procedure was I don't think, I'm not confident that on the law, it may turn out that it is that way, and if it is we will certainly concur in it, but I don't think that under the law any appearance of bias leads necessarily to a recusal where the parties don't consent. There are times when people make motions to recuse judges on the basis of appearance of impropriety and it's not granted. It may be -- and that's affirmed and it's fine. Because the idea is you cannot choose your judge by simply failing to consent.

It may be, your Honor, and I understand that 455(a) also creates a hierarchy of problems, and it may be that this problem is so great that that is the case. All I'm asking the Court is for a brief opportunity to assure myself that that is the case and I will not press any position that I don't think it's warranted in the law, but if your Honor were to give us a short opportunity to do that, I would just like to be able to do that research and report back to the Court what the result of that is.

MR. SHARGEL: I object and I'll tell you why. Because if Ms. Chung wanted to make an argument under 455(a), the argument should have been made before the notice went out and then there would be no question. If she could convince you or persuade you that under the law the recusal was not appropriate, despite what your Honor initially found after reading the presentence report, that would be a different story, then you would have decided based on submissions from the parties and an opportunity to reflect on it that recusal was not warranted.

This started, this procedure started with your Honor's conclusion that recusal was warranted if there wasn't a unanimous waiver. The time for the government to speak was at the last appearance. It's not now. Because the only thing that could happen is, again, a new appearance of bias. That's going to be the result, a new appearance of bias.

THE COURT: All right. Well, I've previously indicated that the issue here in the Court's view turns on my wife's and my respective ownership of stock in AXA Financial. I told you at the last hearing that I

would undertake efforts toward divestiture, but that I was not confident that it could be done in time or insufficient time to permit sentencing to go forward. That fact has not changed. In fact, I have learned that it is more difficult than I've suspected, on June 12th, for my wife and I to divest ourselves of those shares because it involves multiple exchanges of stocks, and therefore there is no way that that could be accomplished in any reasonable time frame, notwithstanding that efforts are underway in that direction.

I reluctantly feel that it is, it's not the reality of impropriety, it's the appearance that is the trigger under 455(a), and I really do not believe that it's going to serve any purpose at this juncture to prolong the process.

MS. CHUNG: Your Honor, I do feel compelled to address that. It is not the case of an appearance of impropriety, that if I had 15 minutes I could find your Honor cases, including Supreme Court cases that say that that is not the trigger for automatic disqualification.

I feel that I'm sort of being sand-bagged here because, your Honor, what we discussed at the last conference, and I have the transcript, is that we would show up on the 10th and find out what the result of the disqualification issue was, and I had asked if there is some way we can have an assurance that we're going to be here and your Honor is still on the case one way or another so that we can discuss where to go from there. Mr. Shargel joins me. He says, "To be frank, I

have concern in the mirror image. My concern is that if we were doing this by the black ball method, then the government might seek a disqualification under the cover of unanimity. So that's my concern. So I agree that we should appear on that date."

What your Honor said is, "All right, I will take no action myself with respect to the case until we have a chance to address any issues on July 10th, and then I'm going to make it known to the clerk," and then you went on to discuss what the procedure would be.

The point of my asking for this date, your Honor, was so that we could discuss where to go from here, and now what's happening is exactly what I thought we had agreed not to do, which is that we're going to show up and find out that you were disqualified, there was no recourse at this point.

I guess what I'm asking for is just the chance that I thought we had agreed on at the last conference, and I say if your Honor wants to set a tighter timetable I don't have a problem with that, but I do feel as though there is a misapprehension of the law here and I would like to have an opportunity to correct that if it is the case that as I'm remembering how 455 works, that that's correct.

Your Honor, I can at least do some research by tomorrow and maybe I'll have convinced myself by that time that it really doesn't pan out the way I think that it does.

THE COURT: I'll tell you that I've done an awful lot of thinking and my law clerks have done a lot of research in connection with this issue. I don't see how, given my inability to promptly divest myself of those shares, that I can continue to serve as the judge in this case, notwithstanding the amount of judicial energy that has been put into this litigation over the last two and a half years.

MS. CHUNG: Your Honor, that is definitely a factor that plays into my calculus also. I mean, again, there is a lot of language in the cases about how, you know, there is a definite burden that occurs when, especially one that has gone on this long, gets transferred at this point.

I can say more than that, you know, the appearance of impropriety is not in and of itself a reason for automatic disqualification because one of the parties doesn't agree to that. That's never been my understanding of how that statute works. My only thought was there might be something in the judicial cannons, and if your Honor had something to refer us to that would quickly dissuade me of my view, I would certainly look at that, but 455(a) sets up a regime where certainly appearance is a very important part of it in addition to actual conflict or ethical issues. But appearance of impropriety is not the only -- once you reach appearance of impropriety, that doesn't mean there is an automatic disqualification, and one of the reasons is exactly the reason your Honor mentioned, is the idea that it burdens the judicial system to create any kind of regime in which parties can either opt out of a judge or even judges can transfer cases based in

which they have a lot of knowledge and invested a lot of time because of a recognition that creates burdens for their --

MR. HESSION: Your Honor, may I just be heard for a moment. I'm sitting here listening to both counsel and it occurs to me that one of the overlooked facts is that it's the Court that's making the application, in effect. You are determining that you believe there's a disqualifying factor according to 455(a).

That having been said, my problem is with the system that's been set up in terms of any one of the litigants in that since it requires a unanimous determination, one of us is precluded from making a choice without, in effect, waiving a very significant potential appellate right; a waiver waives any questions as to the Court's disqualification; a refusal to waive waives a very significant right to have this Court sentence a defendant as we've all agreed, where the Court has heard over two and a half years of trial testimony, hearings, etc.

So from that perspective, Judge, my challenge is to preserve a record someplace where each one of us can establish our objection to whatever the determination of the Court is, as unreasonable as that may sound, one of us may not be happy with how this goes and being forced to make that choice today I believe prejudices my client. I think Ms. Binion was substantially prejudiced by the procedure established herein. Because either way, either choice that she made forced her to waive a potentially significant appellate right and it's that which I want to preserve.

So in the sense of arguing against the Court, the Court has found as a fact that there is a disqualifying factor. I think Ms. Chung's comments are correct. But it's not one of us that's applying. It is the Court that has made the determination already. You're the finder of fact on that issue. If I've read you correctly, you've determined the facts. So if from that perspective we've only decided whether the procedure is fair and whether, in fact, we all have to be unanimous - do we all have to move to another part? Is your ruling binding on all of us if one of us waives or doesn't waive? So it's those issues that I think at some point in the time we need to discuss to make sure it's fair to all of the litigants.

MS. CHUNG: United States v. Baillis, a Second Circuit case, this is obviously an instance where Baillis was a case where a Judge Baer initially ruled that the evidence would be suppressed and then reversed himself after the supplemental hearing and ruled that he would not suppress the evidence. At that point in time, in the meantime, there had been an outcry over the fact that Judge Baer had ruled in the initial hearing, as part of his findings, he found that he believed it was not suspicious in any way for somebody to run from the police. You may remember, there were calls for him to be impeached, there were comments made by the President's office in which the President's counsel said that the President lacked confidence in Judge Baer. When the judge reversed himself, Ms. Baillis moved to recuse himself. Obviously she would have taken the position like Mr. Shargel does that the judge should be off the case because of an appearance -

MR. SHARGEL: Wait a minute. What is she saying? I can't believe this. This is absurd. This is absurd. I am not standing before you saying that I didn't waive. I'm required to do that. What is Mr. Chung doing?

MS CHUNG: Your Honor, one party or the other obviously wanted the judge off the case. In this case it was Ms. Baillis. What happened is Judge Baer did not recuse himself, even though is was a 455(a) issue, it was an appearance of impropriety issue, and the Second Circuit affirmed that, all be it on a different ground, but the case and the procedural history of the case shows that an appearance of impropriety is not grounds for automatic recusal - and that happens everyday, people move to recuse judges and they lose under 455(a).

That proves that it's not in and of itself the fact that a party objects, one party or the other is not grounds for removal of a judge. What the Baillis panel says in addition is some of what I've been saying today, although the reach of Section 455 is broad, it has significant limits; thus our cases state that disqualification is not required on the basis of remote, contingent or interspeculative interests. Moreover, the legislative history of Section 455 cautions that it is not intended to be used by judges to avoid sitting on difficult or controversial cases. In the instant case, the parties don't dispute this legal standard.

Then it goes on to discuss how the standard should be applied in that case. But this is exactly the line that I'd like to explore, if your Honor could give us 24 hours to do that.

THE COURT: Well, everybody's had a month to explore it. To the extent that the government seeks restitution on behalf of the Equitable Insurance Company, I and my wife have financial interest in the Equitable Insurance Company, which as I've previously indicated to you doesn't even go by that name anymore, it's AXA Financial - and it doesn't even go by that name as I've recently learned, it's AXA ADS now.

MS. CHUNG: Your Honor -

THE COURT: It seems to me there would be a very simple way for the government to clear this entire matter. It's so simple that maybe it hasn't occurred to the government.

MS CHUNG: Well, you Honor, I would like to consider that opinion. I also - I mean another case, Judge Mukasey had a case, an American Express case. Several judges turned the case down upon the grounds that they had American Express cards. Judge Mukasey took the case and it was exactly this procedure I think that was used. Even though I think there was an objection in that case to him being on the case, he found that it was appropriate for him to sit on the case. One of the reasons at that point was that he felt that it could not be the situation where essentially it just ended up being pushed from judge to judge because

every judge had an American Express card and what he found was his interest in owning the card was so remote or unspeculative that even though there was an appearance, and since he had no question that he had actual bias - which your Honor has never suggested, never suggested that you have actual bias, certainly the parties aren't saying that you have reason to be bias - that it was appropriate for him to sit on the case.

So that again is, to me, it just demonstrates more, that there's more here than meets the eyes. Again, I apologize. I don't like being put in this position of being unprepared to address that at this particular moment.

THE COURT: But that situation involving American Express is very different from what confounds me in the sense that that's akin to being a depository at a bank. That's not any interest that creates any appearance of impropriety or any disqualifiable financial interest.

MS CHUNG: Well, your Honor, the judges who recused themselves from the matter obviously felt differently about it.

THE COURT: I don't know why they recused themselves. Did they issue any opinions? If they did, I haven't seen them.

MS CHUNG: Your Honor -

THE COURT: They probably simply signed a memorandum and the case went back to the wheel.

MS. CHUNG: Your Honor, it wouldn't make the application of the legal standard any different. It wouldn't - if the standard was that, you know, they could avoid the question of how remote or speculative or immediate and direct the consequence was simply by issuing a memorandum order, I don't think that any of - I mean that's exactly the question that I think needs to be addressed here, and I do think it is a matter of balancing. Certainly I have, it's our case and I want to do the right thing about the case, but I also think that there is a question here that needs to be answered for the good of the interests that are being talked about in the Baillis case.

So given that we are here and it's been, you know, over the last three weeks that this process has evolved, and I understand that the Clerk's Office was very prompt, but I don't think that another 24 hours in trying - you know, maybe I'll write the Court tomorrow and say I've looked at it and it's more complicated than I though, I was thinking of other cases that were not analogous of this case because of X - sometimes you find the answer very quickly - but given where we are in this process and how much we've all invested in it, I would just like to believe that another 24 hours is possible.

MR. SHARGEL: I don't want you Honor to think this is the question of another 24 hours. It's not a question of another 24 hours. What's supposed to happen when the government writes a letter? Is

someone supposed to oppose the government's position? Is someone supposed to argue against the government's position?

We have a problem here. Your Honor knows as an experienced trial lawyer, and I'm speaking in the abstract, that and experienced trial lawyer might think very carefully before moving to recuse a judge. Obviously losing a recusal motion is not a happy result for someone who is then going to embark on an important piece of litigation.

We were told, we were told by your Honor that this would be done under a structure or a system that ensured unanimity. And now what's to happen? Are they entitled to write a letter and no one answers? I don't get it. This is - we are in a position that was carefully constructed for unanimity - it's like when you choose an anonymous juror, all of a sudden the unanimity is broken. We can't go any further with it.

I submit in light of what's happened and that in procedural history what's occurred here, we have no choice. I respectfully submit, you know, I say this will all respect, we have no choice but to go forward in the manner that your Honor said, which is if we don't have a unanimous waiver after you've analyzed the facts, after you've put the facts on the record, after you had your law clerks research the issue, you're essentially saying you have an opportunity to waive and you have an opportunity not to waive. Now we're being put in a position where the world has turned around, it's

completely different, the government wants to come in and litigate like it's last month. It's not last month, it's this month.

I respectfully say that under the unusual perhaps the peculiar circumstances, and I say the procedural circumstances, before we even get to the substance, that under these circumstances there is no choice but to order recusal at this time. I respectfully submit.

MR. HESSION: Judge, just for clarification, the Court is arguing in language though that seems to infer that the disqualifying financial interest that you determined is one that cannot be waived. I gather from your language from the financial interest language that you use that you may be describing something that the parties are not entitled to waive, and that is my objection. My position is that if I'm forced to waive or not waive, I prejudice my client another way.

MS. CHUNG: I don't. I think this question is exactly the question. It's either your Honor has always been treating it as it's not waivable. I don't think that's – I'm sorry.

THE COURT: No, I've been treating it as waivable.

MS. CHUNG: It can be waivable.

THE COURT: Because it's a 455(a).

MS. CHUNG: But also, your Honor has been saying that if it's not waived, that leads to automatic disqualification, and that's the part of it that I think is not correct, because the cases demonstrate that it's not just a party's election as to whether or not disqualification is appropriate that causes the disqualification to occur.

All I'm proposing to do, the only question I'm proposing to answer is the procedural one, which is either we're going to come back and say we've looked at this matter of what the problem is in shares of the stocks and we agree that it leads to automatic disqualification in the absence of a waiver, or we don't. In that case, I do disagree with Mr. Shargel. I'm saying he's not entitled to that unanimity. There's a lot of circumstances where you're not, where the cases show you have to make the motion, and that's what I raised with your Honor at the last proceeding expressly, that was exactly my concern, I said, you know, I hadn't looked at the statute in a while and my understanding of it is you are entitled to automatically get the judge disqualified just by not consenting, that what it requires is making the motion.

MR. SHARGEL: But also, your Honor has been saying that if it's not waived, that leads to automatic disqualification, and that's the part of it that I think is not correct, because the cases demonstrate that it's not just a party's election as to whether or not disqualification is appropriate that causes the disqualification to occur.

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MR. SHARGEL: Here is the new fact. The notice which is post-dated, the notice itself said Judge Pauley will recuse himself until there is unanimous waiver. So if we have a notice from the Clerk's Office saying that this is the procedure in place, entirely consistent with what your Honor directed, how can we now be in a position, well, if you want recusal, move for recusal. We're not starting over. The government should have said something when they got the notice. If they didn't say something before, they should have objected when the notice came.

THE COURT: I have your arguments. We're going to take a very short recess.

MR. SHARGEL: Very well.

(Recess)

THE COURT: My amended order dated June 6th, 2001 set forth the case authorities on which I rely in connection with my analysis of the situation under 455(a).

Having found the appearance of impropriety given what was revealed to me in the presentence report with respect to Equitable, now known as AXA, I issued the notice and conducted the hearing. I am convinced that what the code of conduct had in with respect to unanimity is well worth preserving and that nothing productive can be accomplished by a further discussion or further briefing on the issue. In fact, I'm convinced that further briefing or discussion on the issue would merely spawn more litigation in this matter, and because I cannot in a timely fashion divest myself of AXA Financial, I believe that I am compelled to recuse myself based on the finding under 455(a) and because of all the other circumstances that I've set forth on the record, including Dr. Laurensen's continued confinement at MCC. I think that the best course is for the matter to be swiftly reassigned to another judge and I will take the appropriate steps tomorrow morning to start that process.

So in that connection, I wish all the parties and counsel well in the further progress of this case, but I'm convinced that this is what I'm required to do in light of what was disclosed to me in the presentence report.

MS CHUNG: Your Honor, we are left with the proposal that your Honor had raised and I can do that. I don't want to do that without consulting with the superiors in my office because it does involve waiving a victim's rights.

THE COURT: That is something that should have been thought about and done, and I think that the way in which this argument progressed today that was really not in the best interests of the order that I envisioned or the notice that all of you received, which made it clear that among all things unanimity was to be preserved and the decision process was to be independent of the district judge assigned to the matter, to the extent that I can still preserve that by disregarding certain arguments that were made today, I certainly intend to do that. No one in the court has in any way violated that unanimity, and to this moment I only know that there was nct unanimity among the parties and I decline to engage in any of the speculation on or off the record.

Have a good evening.

MS CHUNG: Thank you, your Honor.

MR. SHARGEL: Thank you, your Honor.

(Matter adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FROM: **James M. Parkison, Clerk of the Court**

TO: **Christine H. Chung, Esq.**
(Assistant United States Attorneys)
James G. Cavoli, Esq.

Gerald L. Shargel, Esq.
(Attorneys for Defendant Lauersen)
Sarita Kedia, Esq.

Thomas R. Hession, Esq.
(Attorney for Defendant Binion)

DATE: **June 14, 2001**

RE: **United States v. Lauersen and Binion,**
S2 98 Cr. 1134 (WHP)
Notice concerning waiver of judicial disqualification

[Filed: June 14, 2001]

Canon 3D of the Code of Judicial Conduct provides (with exceptions not pertinent to this case) that when a judge is disqualified in a proceeding because "the judge's impartiality might reasonably be questioned," the judge may participate in the proceeding if all the parties and lawyers, after notice of the basis for the disqualification, agree in writing to waive the disqualification under a procedure independent of the judge's participation.

Unless a waive is obtained from all parties and all counsel, Judge William H. Pauley III intends to disqualify himself in this proceeding because of the circumstances set forth on the record in this action during a conference conducted In open court on June 12, 2001. A copy of the transcript of that proceeding is attached to this Notice and made a part hereof.

If you and your client wish to waive Judge Pauley's disqualification, letters to that effect from you and your client must be sent to me within ten (10) business days of the date of this Notice. The letters should not be sent to Judge Pauley and copies should not be sent to other counsel. If all parties and all counsel submit such letters, this Notice and all responses will be made part of the record, as required by Canon 3D, and Judge Pauley will continue participation in the proceeding. If a waiver is not received from all parties and all counsel, this Notice and any responses will be kept under seal by the Clerk and not shown to Judge Pauley, nor will Judge Pauley be informed of the identity of any party or lawyer who declined to waive the disqualification. If the disqualification is not waived, the case will be reassigned to another district judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v.

NIELS LAUERSEN and
MAGDA BINION,
Defendants.

----------x

(S2) 98 Cr. 1134 (WHP)

June 12, 2001
4:30 p.m.

[Dated: June 12, 2001]

Before: HON. WILLIAM H. PAULEY III,
District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
CHRISTINE CHUNG
JAMES G. CAVOLI
Assistant United States Attorney

GERALD L. SHARGEL
SARITA KEDIA
NATHAN DERSHOWITZ
Attorneys for Defendant Lauersen

THOMAS R. HESSION
Attorney for Defendant Binion

(Case called)

THE COURT: Will counsel give their appearances?

MS. CHUNG: Good afternoon. Christine Chung and James Cavoli for the government.

MR. SHARGEL: Gerald Shargel and Sarita Kedia for defendant Lauersen. I have forgotten that Nathan Dershowitz is here with us this afternoon.

MR. HESSION: Thomas Hession for defendant Binion.

THE COURT: I also note the presence of the defendants Dr. Lauersen and Dr. Binion.

I scheduled this hearing by order of June 6, 2001 after I received and reviewed a copy of the presentence investigation report prepared by the probation department and dated June 1, 2001.

At the outset I would like to clarify that any references in that June 6 order to Section 445(a) or 445(b) should be to Section 455(a) or Section 455(b). I will enter an amended order making that change today.

Paragraph 46 of the presentence investigation report contains a detailed listing of the names of the entities that are eligible for restitution as recommended by the probation department. For restitution purposes the probation department asserts that the total known loss is $3,287,652.

Prior to receiving the presentence investigation report the issue of restitution was not squarely presented to this court. Upon review of the PSI I noticed that it identifies the Equitable Insurance Company as a victim eligible for restitution.

Equitable was never mentioned in either of the indictments returned in this case or during either of the two lengthy trials. The PSI does not reflect the fact that the Equitable Insurance Company demutualized in 1992, distributed shares to its policyholders and changed its name to AXA Financial, Inc.

My wife and I together own 400 shares of stock in AXA Financial as a consequence of whole life insurance policies that we have maintained for each other's benefit.

On January 2, 2001 I am informed that the AXA Group made a tender offer for the shares of AXA Financial. I have been advised that shares of AXA Financial are no longer publicly traded. My wife and I are initiating steps to exchange our shares of AXA Financial for cash and AXA American depository shares. The exchange ration is $35.75 and .295 AXA ADSs for each share of AXA Financial. On June 11, 2001 an AXA ADS traded at $28.75.

Given the process involved in effecting this exchange it is unlikely that it can be completed prior to the sentencing of the defendants.

In this court's view of my holdings of AXA Financial stock constitute a financial interest that requires disqualification pursuant to 28 U.S.C. Section 455(a) in order to avoid any appearance of impropriety.

In addition, in this court's view the whole life policies held by my wife and me are insurance products and do not constitute a disabling financial interest in the company as defined by 28 U.S.C. Section 455(d) (4.)

The indictment disclosed that Prudential Health Care was a victim insurer. In the summer of 1999 Aetna U.S. Health Care purchased Prudential Health Care.

Prudential Health Care is not identified as a victim in the PSI and during the trials reference was made to the fact that it had been acquired by Aetna U.S. Health Care.

My wife holds an annuity with the Prudential Insurance Company of America with a current value of between $50,000 and $100,000. The Prudential insurance company has announced a plan to demutualize subject to the approval of its policyholders.

In May 2001 my wife received information from Prudential advising her that she will receive between 74 and 84 shares of stock with an estimated value of between 22 and $38 per share if the demutualization is approved and the newly formed company goes public at the end of 2001.

In this court's view from the time this criminal case was reassigned to me on November 23, 1998 until the time that Prudential Health Care was divested in the summer of 1999 the annuity held by my wife was an insurance product and did not constitute a disabling financial interest in the company as defined by 28 U.S.C. Section 455(d) (4).

In addition, demutualization does not create a basis for disqualification under 28 U.S.C. Section 455 because neither Prudential Insurance Company nor any of its subsidiaries is a victim eligible for restitution.

Finally, the presentence investigation report also discloses in paragraph 46 that AT&T is a victim eligible for restitution. My wife owned shares of AT&T until September 1999 when she divested them. This court had no knowledge that AT&T was a possible victim and thus did not disclose this interest any earlier. In any event, given my wife's divestitures, her former holdings do not represent a disabling financial interest.

I am making these disclosures to the parties so that the parties can have an opportunity to consider the matter and submit any motions for disqualification that they deem appropriate.

In addition, the parties will be receiving a notice concerning waiver of judicial disqualification which I will cause the clerk to send to the parties and counsel in this case. That form as approved by the advisory committee on codes of conduct of the judicial conference in September of 1985 provides in substances as follows. As I said, it will be from the clerk to counsel.

Canon 3D of the Code of Conduct provides, with exceptions not pertinent to this case, that when a judge is disqualified in the proceeding because the judge's impartiality might reasonably be questioned, the judge may participate in the proceeding if all the parties and lawyers, after notice of the basis for the disqualification, agree in writing to waive the disqualification under a procedure independent of the judge's participation.

Unless a waiver is obtained from all parties and all counsel, I intend to disqualify myself in this proceeding because of these circumstances which have been set forth on the record today.

The notice will go on to advise counsel and the parties as follows, that if you and your clients wish to waive the judge's disqualification, letters to that effect from you and from your clients must be sent to the clerk of the court within a certain number of days of the date of the notice. The letters should not be sent to the judge and copies should not be sent to other counsel.

If all parties and all counsel submit such letters this notice and all responses will be made a part of the record as required by Canon 3D and the judge will continue participation in the proceeding.

If a waiver is not received from all parties and all counsel this notice and any responses will be kept under seal by the clerk and not shown to the judge nor will the judge be informed of the identity of any party or lawyer who declined to waive the disqualification. If the disqualification is not waived the case will be reassigned to another judge.

Having made these disclosures I, of course, invite any questions that the parties or counsel may have at this juncture concerning any of these interests that I have disclosed here today.

MR. SHARGEL: I don't have any questions. Obviously, we need the opportunity to review these facts, to consult with our client and my suggestion that I am sure is the court's suggestion is that we set a schedule.

THE COURT: Yes. That is what I would like to do. It is necessarily going to require an adjournment of the sentencing. That regrettably is unavoidable at a minimum.

I am prepared assuming that the clerk can get the notice out, I think that you should also have the benefit of this transcript.

MS. CHUNG: We will order the transcript today.

THE COURT: I am prepared to give you as much time as you would like to consider the matter.

MR. SHARGEL: Judge, I wonder - actually there is one question. When you say "all parties," I assume - the question was just raised here at the defense table and probably makes sense to air this question. It is all parties including the government?

THE COURT: Yes.

MR. SHARGEL: I am wondering if it makes sense, and please indulge me, I am thinking out loud. I wonder if it makes sense to, on the assumption that there is a waiver, recess the sentencing date and then work backwards so there is adequate time before that.

I have been overruled by my own colleagues. Without an order of the court I have been overruled.

THE COURT: Do you want to take a moment to confer with the government and with your co-counsel?

MR. SHARGEL: Okay.

(Pause)

MR. SHARGEL: Assuming that the notice comes in all deliberate speed then two weeks from today should do it for our response.

THE COURT: I assume you mean the all deliberate speed of the notice?

MR. SHARGEL: How about two weeks from the notice?

THE COURT: That is fine. I am going - assuming that the clerk can issue the notice tomorrow, I will set the matter down for June - actually, I am going to give you two weeks to respond to the clerk completely independent of responding to the court.

There is no response is due from the court other than if you wish to make any motions but you can - at this juncture in the absence of consent among all parties and counsel, the court under 455(a) will be required to recuse because having determined that the one financial interest is ADSs it is simply impossible to effect a transfer of that under this exchange program as it currently stands. So it seems to me that a status conference in this case would only be appropriate, something more than two weeks out from now, just so that we can determine where we are.

MR. SHARGEL: With the understanding that two weeks from the clerk's notice we will respond to the clerk.

THE COURT: Yes. I will make it clear on the face of the notice and we will put a specific date in the notice by which parties must respond, we will give at least 10 days, at least 10 business days for the parties to consider the matter.

MR. DERSHOWITZ: Your Honor, I am curious whether the clerk's office has a procedure in place for its expeditiously evaluating and then advising or whether they don't. It is not in your hands, it is in the clerk's hands.

THE COURT: I don't know. I think the safer course to the extent that we want to schedule a conference in this matter is to put a conference down for the week of July 9 because certainly by then the issue with respect to the clerk and 455(a) will have been resolved one way or the other.

MR. SHARGEL: Can we put this down for the 13th? I am going to be on trial before Judge Traeger and we are not working on Friday.

MS. CHUNG: I am sorry. I am going to be - we discussed this in connection with Dr. Binion's sentencing. I will be out of the country on the 13th. I will be here until the 11th.

MR. SHARGEL: I can do it at the end of the day.

THE COURT: I will put it down - July 11 is going to be a problem for me. I can do it any other day that week other than -

MR. SHARGEL: The 10th at 5:00?

THE COURT: The 10th at 5:00 is fine.

Are there any other inquiries that counsel wish to make or anything that I can do to explicate this matter further as it has been disclosed?

MS. CHUNG: Can I raise one concern? It has been a while since I have had dealings with this statute. I am not entirely familiar with the procedures that we are embarking upon.

I do think, or I would at least like to preserve the possibility of arguing, and maybe this doesn't come into play at all because everybody waives, but I do - I may have a disagreement with the court's view, I think, that you just expressed, that the disqualification would be automatic in the event that there wasn't a waiver from any party and I guess the reason I raise that is I would like to be sure that we can be heard on that if it becomes necessary.

I don't want to show up on the 10th and find out that you have disqualified yourself, your Honor, and if there is some way we can have an insurance that we are going to be here on the 10th with your Honor still on the case one way or the other so that we can discuss where to go from there. I take it there is going to be the time when your Honor is reporting back what the result of the waiver situation was.

MR. SHARGEL: To be frank I have a concern in the mirror image. My concern is if we are doing this by the black ball method that the government might seek your disqualification under the cover of anonymity so that is my concern so I agree that we should appear on that date.

THE COURT: All right. I will take no action myself with respect to the case until we have had a chance to address any issues on July 10 and I am going to make it known to the clerk that it will be important to have all of the responses back at the time and I would alert the parties as I did last Friday that to the extend that there are any emergency applications or orders that need to be signed between now and July 11, I think that until my status is resolved, that it would be inappropriate for me to be signing additional orders or taking action in this case and that is why I referred the parties to the Part I Judge last Friday.

Is there anything further that we can address?

MR. HESSION: Just a clarification, Judge. We will probably then reserve scheduling the sentencing briefs on Dr. Binion until after July 10 and at that time if this court is still involved the schedule will be set by your Honor, if not, we will move to whatever part we have to go to.

THE COURT: I think that makes sense.

MS. CHUNG: That is fine, your Honor.

THE COURT: All right. Thank you for coming in this afternoon.

(Proceeding adjourned)

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

July 11, 2000

VIA HAND DELIVERY

Honorable William H. Pauley III
United States District Judge
Southern District of New York
40 Centre Street, Rm. 234
New York, New York, 10007

Re: United States v. Lauersen et al.
S1 98 Cr. 1134 (WHP)

[Filed: July 11, 2000]

Dear Judge Pauley:

The Government respectfully moves for reconsideration of your Honor's decision yesterday afternoon to recuse yourself from this case, after having presided over this case for nearly three years, and through two six-week trials, comprising 14,000 transcript pages. The Court's decision, we submit, was based on a fundamental misapprehension of the

standard that governs recusal under 28 U.S.C. § 455(a) and Canon 3 of the Code of Conduct for United States Judges.

It is apparent from the proceedings thus far that the Court believes that the Court's ownership of "a financial interest in at least one of the entities that is eligible for restitution" must result in recusal, absent unanimous waiver by the parties. See Amended Order dated June 6, 2001 at 1.

That view is mistaken. Case law makes clear that recusal can be denied in a criminal case, even if one party desires disqualification, when the judge has a financial interest in a victim company. See, e.g., United States v. Ravich, 421 F.2d 1196, 1205 (2d Cir. 1970) (rejecting defendant's claim that judge should have recused himself because of ownership of shares of bank victim, based on reasoning that value of shares was so small that "interest" was "unsubstantial," and indeed, "nonexistent") (Friendly, J.); United States v. Sellers, 566 F.2d 884 (4th Cir. 1977) (affirming denial of disqualification motion made by defendant where judge's interest in victim bank was "so remote as to be for all practical purposes nonexistent").

The reason that a party's "veto" is insufficient, in and of itself, to cause disqualification of a judge - even one who has a financial interest or other interest specified in Section 455(a) or Canon 3C - is that the question of waiver is wholly irrelevant unless the Court first finds, applying an objective standard, that the Court is in such a position that its impartiality "might reasonably be questioned." 28 U.S.C. § 455(a)

(emphasis supplied); Canon 3C of the Code of Conduct For United States Judges (emphasis supplied).[1] This standard was approved by the Supreme Court in Liteky v. United States, 510 U.S. 540 (1993), where the Court held that all grounds for recusal under subsection(a), which is meant to encompass claims of "interest or relationship" and "bias and prejudice," id. at 548, must be "evaluated on an objective basis," id. – i.e., using the test of whether there are "reasonable grounds to question the neutral and objective character of a judge's rulings or findings." Id. at 557-58 (Kennedy, J., concurring).

The Second Circuit also has repeatedly held that the standard for judging any claimed appearance of bias under subsection (a) is objective, see, e.g., United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992) (Section 455(a) requires showing that "an objective, disinterested observer fully informed of the underlying facts would entertain significant doubt that justice would be done absent recusal"); United States v. Bayless, 201 F.3d 116, 127-28 (2d Cir. 2000) (question under Section 455(a) is whether "a reasonable person understanding all the relevant facts would recuse the judge"); Aguinda v. Texaco, Inc., 241 F.3d 194, 201 (2d Cir. 2001) (" '[D]isqualification for lack of impartiality must have a reasonable basis' ") (quoting S. Rep. No. 93-419 at 5 (1973)), and has expressly stated that the question of waiver does not arise until after the Court finds that disqualification would otherwise be required under the objective standard. In United States v. Hardy, 878 F.2d 94 (2d Cir. 1989), the Court specifically noted that the waiver procedure set forth in Section

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[1] This language is identical in the statute and canon

455(e) becomes applicable "[o]nce a judge determines that he or she is disqualified on the ground of appearance of impropriety under section 455(a)," id. at 98 n.5 (emphasis supplied) (noting also that Code sets forth "precise procedure" to be followed once disqualification deemed necessary under section 455(a)); see also United States v. Nobel, 696 F.2d 231, 235 (3d Cir. 1982) (examining whether waiver was given under Section 455(e) only after determining that court, under objective test, should have disqualified itself for owning shares in victim entity).

Your Honor has never applied the required objective standard or made any finding that the Court's impartiality might "reasonably" be questioned by a dispassionate observer. Indeed, the record would not support any such finding because it is devoid of any facts relevant to the objective inquiry, facts such as, most notably, the number or value of AXA Financial, Inc. shares that are outstanding. See United States v. Ravich, 421 F.2d at 1205 (finding that financial interest in victim failed to be "substantial" where judge owned 325 shares in bank, worth $10,000 to $15,000, but that ownership represented only .0072% of the bank's 5,391,527 shares); United States v. Sellers, 566 F.2d at 887 (finding that financial interest in victim did not require recusal under objective standard where judge and his children owned less than 1/25th of 1% of the outstanding stock).

In fact, AXA Financial Inc., the entity in which your Honor and his wife own 400 shares (with a value of approximately $17,000), has approximately 460 million outstanding shares and $5.8 billion in

shareholder equity, according to its 1999 annual report. Accordingly, the Court has a financial interest in approximately .00009% of the 460 million outstanding shares. AXA Financial (i.e., the company encompassing the former Equitable Life) stands to gain at most $13,046 in restitution. In these circumstances, the "interest" that your Honor has is infinitesimal. No reasonable observer knowing these facts could conceivably believe that any appearance of partiality exists based on the shares at issue.

In the absence of any finding that your Honor's impartiality "might reasonably be questioned," there is no basis for disqualification, regardless of whether waivers were obtained from the parties. And indeed, because the objective standard has not been - and cannot be - met, the Court has the duty not to disqualify itself. The Second Circuit emphasized in Aguinda v. Texaco, Inc., that "a judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." 241 F.3d at 201 (quoting In re Drexel Burnham Lambert, 861 F.2d 1307, 1312 (2d Cir. 1988)); In re Nat'l Union Fire Insur. Co. of Pittsburgh, PA, 839 F.2d 1226, 1229 (7th Cir. 1988) ("judges have an obligation to litigants and their colleagues not to remove themselves needlessly").

The Government questioned the validity of the "waiver" procedure upon which the Court embarked at the conference on June 12 and reserved its right to brief the issue should any party raise any objection to the Court's sentencing of the defendants. AUSA Chung stated on June 12th:

> I may have a disagreement with the Court's view,...that the disqualification would be automatic in the event that there wasn't a waiver from any party and...I would like to be sure that we can be heard on that if it becomes necessary.

(6/12 Tr. at 10-11). The Government was unaware, until last evening, that any party had failed to "waive." That failure, however, is entirely irrelevant. As the foregoing demonstrates, the Court did in fact mistakenly invert the process of determining, first, whether the Court's partiality "might reasonably be questioned," and, second, whether the parties were willing to waive a conflict that otherwise would require disqualification. When it then disqualified itself based on one party's veto, this Court wrongly furnished that party with a unilateral vote. See Aguinda, 241 F.3d at 201 ("[l]itigants ought not have to face a judge where there is reasonable question of impartiality, but they are not entitled to judges of their own choice." (emphasis supplied) (quoting S. Rep. No. 93-419, at 5 (1973)); United States v. Cooley, 1 F.3d 985, 993 (1993) ("the statute is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice").

The objecting party here has no right to disqualification unless your Honor makes the threshold finding that a reasonable person would believe that the appearance of your Honor's impartiality is compromised by the ownership of .00009% of the 460 million shares of a company with 5.8 billion in shareholder equity, where that company

stands to gain, at most, $13,046 in restitution. More broadly, and contrary to Mr. Shargel's claim yesterday, none of the parties here is yet entitled to "anonymity" in the waiver procedure, because the entire procedure is premature at this point. Rather, if Mr. Shargel or Mr. Hession wish to seek recusal of your Honor, they must do it in the conventional way - by moving for it.

In sum, while the Government is prepared to brief any recusal motion made by the defendants; or any further issue identified by the Court, the record as it stands, the Government respectfully submits, requires that the Court not recuse itself.

Respectfully,

MARY JO WHITE
United States Attorney

By: /s/ Christine H. Chung/James G. Cavoli
CHRISTINE H. CHUNG
JAMES G. CAVOLI
Assistant United States Attorney
(212) 637-2271, 637-2485

cc: Gerald Shargel, Esq.
Thomas Hession, Esq.

UNITED STATES CONSTITUTION

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property. without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 Sec. 455. - Disqualification of justice, judge, or magistrate judge

(a) Any **justice**, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No **justice**, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for **disqualification** enumerated in subsection (b). Where the ground for **disqualification** arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for **disqualification**.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her

household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification

28 Sec. 1291. - Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title

Sec. 1254. - Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY

* * *

C. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

* * *

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person:

* * *

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1), except in the circumstances specifically set out in subsections (a) through (e), may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If the parties and their lawyers after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

COMMENTARY

* * *

NOTE: In September 1985, the Judicial Conference approved a form developed by the Advisory Committee on Codes of Conduct entitled "Notice Concerning Waiver of Judicial Disqualification" and authorized its distribution for consideration and possible adoption by the courts. The form is reprinted below.

NOTICE CONCERNING WAIVER OF JUDICIAL DISQUALIFICATION

FROM: The Clerk

Date_____

TO: XXXX (Counsel)
XXXX (Counsel)
XXXX

RE: ABC v. DEF, _____
Case No.

Canon 3D of the Code of Conduct provides (with exceptions not pertinent to this case) that when a judge is disqualified in a proceeding because "the judge's impartiality might reasonably be questioned", the judge may participate in the proceeding if all the parties and lawyers, after notice of the basis for the disqualification, agree in writing to waive the disqualification under a procedure independent of the judge's participation.

Unless a waiver is obtained from all parties and all counsel, Judge _____. intends to disqualify in this proceeding because of these circumstances:

If you and your client(s) wish to waive the judge's disqualification, letters to that effect from you and from your client(s) must be sent to me within _____ days of the date of this Notice. The letters should not be sent to the judge and copies should not be sent to other counsel. If all parties and all counsel submit such letters, this Notice and all responses will be made part of the record, as required by Canon 3D, and the judge will continue participation in the proceeding. If a waiver is not received from all parties and all counsel, this Notice and any responses will be kept under seal by the clerk and not shown to the judge, nor will the judge be informed of the identity of any party or lawyer who declined to waive the disqualification. If the disqualification is not waived, the case will be reassigned to another judge.

01-1526(L),
01-1600(XAP), 01-1617(CON)*, 01-1686(XAP)

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

- v. -

NIELS LAUERSEN, also known as Niels H. Lauersen,
MAGDA BINION,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC* OF DEFENDANT-APPELLANT-CROSS-APPELLEE NIELS LAUERSEN

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* * *

government was prodded by those companies to bring the case. It largely succeeded in painting the case - - both in court and in public - - as a battle between infertile women and parsimonious insurance companies who were violating the Americans with Disabilities Act in denying coverage.

The specter of conflicts of interests involving insurance company victims was present from the outset. Before the first trial, one of Dr. Lauersen's original lawyers disclosed that his firm, Gibson, Dunn

& Crutcher, had represented several of the victim insurance companies in unrelated civil matters. The following day, Judge Pauley conducted a short colloquy to ascertain whether Dr. Lauersen understood his right to conflict-free counsel. (Tr. 6/10/99 at 6-7). The government objected to the brevity of the Court's inquiry, insisting that counsel's conflict was "a serious one," (id. at 8), and that full-blown Curcio hearing should take place. Judge Pauley acquiesced, though not without expressing displeasure that "this all should have been dealt with a long time ago when the conflict check was done in the firm and this problem was vetted to the client." (Id. at 16).

On June 23, 1999, Judge Pauley held a Curcio hearing, which included the following question and answer:

> Q: And do you understand that, for example, if you pled guilty or were found guilty after a trial, that that might result in a financial benefit to the insurance companies in that they might be able to recover various moneys that the government asserts in the indictment were fraudulently paid to you. Do you understand that?
>
> A: Yes, I understand that.

(Tr. 6/23/99 at 14-15). See also June 22, 1999 letter of AUSA Christine Chung to Judge Pauley ("the potential exists for Gibson, Dunn to be a less than zealous

advocate . . . given that his conviction . . . could result in restitution to the insurers.")[4]

The focus on the insurance company victims continued throughout the proceedings. Before both trials, substantial arguments were made about the admissibility of GX 150 (GX 500 at the second trial), a compilation which listed each of the insurance companies. (JA305). The prosecutor underscored its importance when she observed that "[the] chart is a pretty central piece of our case." (Tr. 6/10/99 at 33). Notably, the chart listed Equitable, among other insurance companies not named in the indictment, evidence of which supported the conspiracy charge.

The prosecutor's emphasis on the importance of the summary chart proved prescient. The chart is referenced in more than 150 pages of the first trial transcript and in more than 250 pages of the second trial transcript. The chart formed the template for extensive direct and cross-examinations of critical government witnesses, including the FBI case agent, and was referred to repeatedly in closing arguments.

Finally, Equitable was, in fact, one of the companies about which defense counsel specifically cross-examined the case agent at the second trial:

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[4] Although Judge Pauley concluded that Dr. Lauersen had knowingly waived the conflict of interest, he adopted Gibson, Dunn's suggestion that "[it] will not handle any of the insurance-related matters that arise at trial, will not cross-examine or participate in preparing the cross-examination of any representatives of insurance companies, and will not handle any pretrial discovery relating to insurance companies or insurance issues." (Tr. 6/23/99 at 18).

Q: Mary C., do you see that, number 79 [referring to entry 79 on chart GX 500, JA308]?

A: Yes.

Q: That is a 1993 procedure, but the insurance company, Equitable, was charged $4900, not $7500, right?

A: Yes.

Q: Do you know as you sit here now why it was that Equitable was billed only $4900? Do you know that?

A: The procedure was billed as a culdoscopy. Maybe they charged less.

(Tr. 12/28/00 at 6075). In short, the panel was mistaken when it wrote that Equitable was not mentioned at either trial.[5]

POINT I

The petition for rehearing en banc should be granted to review the panel's decision that recusal is not warranted under 28 U.S.C. §455(a) when a district judge holds stock in a crime victim entitled to restitution. * * *

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5 Regrettably, the agent's testimony about Equitable was not brought to the panel's attention, either by the defense or the government. See Gov't Br. at 51 n.* ("It is undisputed that Equitable was never the subject of testimony at either trial.").